FREEDOM OF INFORMATION ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 587, S. 1235, S. 1247, S. 1730, and S. 1751

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FREEDOM OF INFORMATION ACT

WEDNESDAY, JULY 15, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch and DeConcini.

Staff present: Tom Parry, chief counsel; Randall Rader, counsel; Steve Markman, general counsel; Peter Ormsby, professional staff assistant; Dickson Burton, law clerk; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Good morning. We will call the Subcommittee on the Constitution to order.

Today we are going to hold hearings on the Freedom of Information Act.

> Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.

With those words from James Madison, I would like to open this first hearing on the Freedom of Information Act. This inspiring quote from one of our foremost Founding Fathers was also invoked in 1974 when the 1966 act was substantially rewritten. It is an appropriate reminder that our national policy favoring an open and free exchange of ideas was not born in 1966.

In fact, another enduring passage would serve well to remind us of the origins of our Nation's policy on freedom of information. That passage reads as follows: "Congress shall make no law abridging the freedom of speech, or of the press." As you all know, that is the first amendment in our beloved Constitution. In the spirit of Madison's comment and under the mandate of the first amendment, our Nation is irreversibly committed to a freedom of information.

Besides the obvious virtues of an open government, the Freedom of Information Act is particularly valuable to a nation which has just recently welcomed the Reagan administration to the White House. President Reagan has reinvigorated our awareness that the Federal Government must be held accountable for its activities.

Otherwise, it could become master rather than the servant of the people.

In the context of this refreshing new attitude of the Reagan administration, I would like to share a favorite passage from American literature. Henry David Thoreau wrote:

> I went to the store the other day to buy a bolt for our front door, for, as I told the storekeeper, the Governor was coming here. "Aye," said he, "and the Legislature too." "Then I will take two bolts," said I. He said that there had been a steady demand for bolts and locks of late, for our protectors were coming.

That is by Thoreau in "Walden and Civil Disobedience."

The Freedom of Information Act can often act like one of Thoreau's bolts. It can protect us from our protectors by giving us some knowledge about how to comply with Government regulations or how to challenge an arbitrary Government decision.

Just as the Freedom of Information Act holds the Government accountable to an informed electorate, however, the Freedom of Information Act itself must also be held accountable. Since the enthusiastic rewrite of the act in 1974, it has at times frustrated rather than fulfilled its basic mission of insuring Government efficiency and informing voters. FOIA has occasionally disrupted vital national security and law enforcement activities and has been misused by businesses which had no intention of keeping abreast of Government programs but found it a convenient tool for obtaining confidential or other information about a competitor.

FOIA seems to be complicating our vital foreign intelligence capabilities by causing reluctance among foreign sources of information to cooperate with U.S. officials. FOIA appears to also restrict sharing of intelligence amongst Federal and State and local law enforcement officials. Moreover, informants are no longer willing to divulge critical information to law enforcement agencies when they have a constant fear and dread that their identities will be disclosed through the Freedom of Information and Privacy Acts.

FOIA also seems to be exploited by competing businesses. More than three out of five requests for information under the Freedom of Information Act are now filed by businesses and their attorneys, not the private individuals, public interest groups, journalists, and scholars that were intended to be the primary beneficiaries of the act.

This subcommittee must begin the legislative process to restore the balance between public access to Goverment information and efficient execution of necessary functions. While insuring that citizens can explore freely their relationship to the Government, we must protect the privacy and confidentiality of other citizens mentioned in Government records.

I would like to conclude these introductory remarks much as I began, with a reminder of our free information heritage. Thomas Jefferson, speaking nearly 200 years ago about the importance of our first amendment, emphasized that:

> Were it left to me to decide whether we should have a Government without newspapers or newspapers without a Government, I should not hesitate for a moment to prefer the latter.

Our free information policy has been one of the hallmarks of our Republic for two centuries. From this perspective, we look forward to examining the Freedom of Information Act to insure that this

fundamental principle is not disrupted by imbalances in the act's implementation.

[The text of proposed legislation follows:]

97TH CONGRESS
1ST SESSION

S. 587

To amend the Freedom of Information Act and to effect other changes in the law for the purpose of increasing the ability of law enforcement agencies to protect the public security.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Freedom of Information Act and to effect other changes in the law for the purpose of increasing the ability of law enforcement agencies to protect the public security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Law Enforcement and Public Security Act".

AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

SEC. 2. Section 552(a)(6)(A) of title 5, United States Code, is amended—

(1) by striking out clause (i) and inserting in lieu thereof the following:

"(i) within thirty days after receipt of the request, notify the person making the request of such receipt, the number of pages encompassed by the request, and the time limits imposed upon the agency under clause (ii) for responding to the request;

"(ii) determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor, within sixty days from receipt of the request (excepting Saturdays, Sundays, and legal public holidays) if the request encompasses less than two hundred pages of records, with an additional sixty days (excepting Saturdays, Sundays, and legal public holidays) permitted for each additional two hundred pages of records encompassed by the request, up to a maximum period of one year;

"(iii) notify the person making the request of the right of such person to appeal to the head of the agency any adverse determination; and"; and

(2) by redesignating clause (ii) as clause (iv).

SEC. 3. The first and second sentences of section 552(a)(6)(B) of title 5, United States Code, are amended to read as follows: "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection

shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the agency can show that exceptional circumstances exist and that the agency is exercising due diligence in attempting to respond to the request, the court shall allow the agency additional time to complete its review of the records.".

SEC. 4. Section 552(b) of title 5, United States Code, is amended—

(1) in paragraph (8), by striking out "or" at the end thereof;

(2) in paragraph (9), by striking out the period and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following:

"(10) rosters of law enforcement personnel or of the personnel of any national intelligence agency;

"(11) confidential law enforcement training manuals, investigative handbooks, and manuals dealing with investigative technologies, developed by the department or agency, or developed through research contracts entered into by the department or agency; or

"(12) any information received on a confidential basis from a foreign government or from a State or local government agency.".

SEC. 5. (a) Section 552(e) of title 5, United States Code, is amended—

(1) by inserting "(1)" immediately after "(e)"; and

(2) by adding at the end thereof the following:

"(2) For the purposes of this section, the term 'person' means a 'United States person' as defined by the Foreign Intelligence Surveillance Act of 1978.".

(b) Section 552 of that title is amended by adding at the end thereof the following:

"(f) The head of each agency may promulgate regulations which provide for access to records by, and the availability of information to, foreign nationals and foreign corporate entities under the provisions of this section. This section does not require the provision of information or access to records to foreign nationals or to foreign corporate entities.".

SEC. 6. Section 552(a)(4)(B) of title 5, United States Code, is amended by inserting the following immediately after the second sentence: "If the court examines the contents of any record of a law enforcement or intelligence agency withheld by the agency under any of the exemptions set forth in subsection (b)(1), (b)(3), or (b)(7), the examination shall be in camera. The court shall maintain under seal any affidavit submitted to the court by a law enforcement or intelligence agency to examine in camera.".

SEC. 7. (a) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) subject to the provisions of subsection (f), records maintained, collected, or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than twenty-five years, (D) tend to disclose the identity of a confidential source, including a State or local government agency or foreign government which furnished information on a confidential basis, and in the case of a record maintained, collected, or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished by the confidential source, (E) disclose investigative techniques and procedures, (F) endanger the life or physical safety of any natural person, or (G) disclose information relating to any investigation of organized crime, espionage, or any conspiratorial activity specified by the Attorney General;".

(b) Section 552 of such title is amended by adding at the end thereof the following:

"(f) A law enforcement agency shall not make available any records maintained, collected, or used for law enforcement purposes which pertain to a law enforcement investigation until the date which is—

"(1) ten years after the termination of any investigation not resulting in prosecution;

"(2) if the person who is the subject of the record has been the subject of two or more investigations not resulting in prosecution, ten years after the termination of the last investigation; or

"(3) if the person who is the subject of the record has, as a result of an investigation, been convicted and subject to probation or a sentence of imprisonment or fine, ten years after the termination of probation, the term of imprisonment, or the imposition of the fine, as the case may be.".

SEC. 8. Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(7) In any case in which a portion of a record requested under this subsection consists of newspaper clippings, magazine articles, court records, or any other item which is public record or otherwise availa-

ble, the agency shall not be required to copy that portion of the record but shall identify such portions by date and source.

"(8) Any person making a request to an agency for records under this section shall be required to state in the request the number of previous requests that he or she has made and the date of each such request. No person may make more than one request per year per agency on any general subject. In any case in which a person makes more than one request on the same general subject in consecutive years, the agency shall not be required to copy any portion of the record previously submitted to the requestor but shall only be required to update the request with information, if any, which has been added to the record since the previous request. Each agency head may promulgate regulations which provide for exceptions to the requirements of this paragraph.

"(9) In any case in which the record requested contains information which has been received from another agency and such information has not been received on a confidential basis, the agency may notify the person requesting the record that such information is available with the originating agency and the burden

of disclosure under this section shall be with the originating agency."

SEC. 9. Section 552(a)(4)(A) of title 5, United States Code, is amended to read as follows:

"(4)(A) Each person requesting a record under this section shall be charged a fee of $10 plus the costs of duplication. Documents shall be furnished without charge or at a reduced charge in any case in which the agency determines that a waiver or reduction of the fee is justified upon a showing of financial hardship.".

SEC. 10. (a) Section 552(b) of title 5, United States Code, is amended by striking out "This section does not" and inserting in lieu thereof "Subject to the provisions of subsection (g), this section does not".

(b) Section 552 of such title is amended by adding at the end thereof the following:

"(g)(1) Notwithstanding any provision of subsection (b), upon a written request which otherwise meets the requirements of this section from a prospective employer engaged in (A) production, distribution, research, special studies or other activities related to the national security, or (B) in the case of a hospital or other health care facility, a business which provides employees access to drugs or physical access to patients or residents, a law enforcement agency shall furnish

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the prospective employer the following criminal history information with respect to a prospective employee:

"(i) Prior convictions other than for misdemeanors, including the date, location, charge, and sentence imposed for each conviction.

"(ii) Prior arrests which have not resulted in conviction, other than for misdemeanors, including date, location, charge, and disposition, if three or more such arrests are reflected in the records.

"(2)(A) If a law enforcement agency has serious reason to believe that a prospective employee is engaging or has been engaged in espionage, terrorist or terrorist support activities, or that such prospective employee is a knowing, active, and purposive member of a group about which the Federal Bureau of Investigation maintains intelligence for national security purposes, the agency, upon a written request which otherwise meets the requirements of this section by any prospective employer, engaged in production, distribution, research, special studies, or other activities related to the national security, shall so inform such prospective employer unless the release of such information might prejudice the national security.

"(B) No information may be released under subparagraph (A) without the approval of the Attorney General or his designee.

"(3) Any information provided to a prospective employer in accordance with this subsection shall be used only by such employer, and the release of such information to any third party by an employer shall be an offense punishable by a fine of not to exceed $10,000.".

SEC. 11. Section 552(b) of title 5, United States Code, is amended by adding at the end thereof the following: "Each agency which carries out law enforcement functions shall prepare and furnish the same general standardized written response for issuance to any person making a request for records under this section to be used both in cases where the agency does not have the records requested and in cases where the records are protected from disclosure because disclosure would reveal that a criminal investigation concerning the person is in progress.".

97TH CONGRESS
1ST SESSION

S. 1235

To exempt certain matters relating to the Central Intelligence Agency from the disclosure requirements of title 5, United States Code.

IN THE SENATE OF THE UNITED STATES

MAY 20 (legislative day, APRIL 27), 1981

Mr. D'AMATO (for himself, Mr. GOLDWATER, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To exempt certain matters relating to the Central Intelligence Agency from the disclosure requirements of title 5, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (a) of section 552 of title 5, United States Code, is amended—

(1) by striking out "(B) On" in paragraph (4) and inserting in lieu thereof "(B)(i) Except as provided in clause (ii), on"; and

(2) by adding at the end thereof the following:

"(ii) No court of the United States shall have jurisdiction to enjoin the Central Intelligence Agency from withholding Agency records or to order the production of such records which are being withheld, unless such records are the personnel records of an individual the disclosure of which is necessary for obtaining employment by such individual outside the Agency.".

(b) Subsection (b) of section 552 of title 5, United States Code, is amended—

(1) in paragraph (2), by inserting before the semicolon at the end thereof the following: "other than the Central Intelligence Agency or, in the case of the Central Intelligence Agency, related to the internal personnel rules and practices of such Agency or to the training or reorientation of personnel of such Agency";

(2) in paragraph (6)—

(A) by inserting "of an agency other than the Central Intelligence Agency" after "similar files"; and

(B) by inserting before the semicolon at the end thereof the following: "or, in the case of the Central Intelligence Agency, any personnel, medical, or other similar files of such Agency (other than personnel records the disclosure of which is

necessary for obtaining employment outside such Agency)";

(3) by amending paragraph (7) to read as follows:

"(7) investigatory records compiled for law enforcement or national intelligence purposes, but only to the extent that the production of such records would—

"(A) interfere with enforcement proceedings,

"(B) deprive a person of a right to a fair trial or an impartial adjudication,

"(C) constitute an unwarranted invasion of personal privacy,

"(D) disclose the identity of a confidential source and—

"(i) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential source, or

"(ii) in the case of a record compiled by an agency conducting a lawful national security intelligence investigation, confidential information furnished by the confidential source,

"(E) disclose investigative or national intelligence techniques and procedures, including intelli-

gence techniques and procedures relating to special activities, clandestine collection, or covert operations of the Central Intelligence Agency, or

"(F) endanger the life or physical safety of law enforcement or national intelligence personnel;";

(4) by striking out "or" at the end of paragraph (8);

(5) by striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon;

(6) by inserting after paragraph (9) the following:

"(10) related to special activities, clandestine collection, or covert operations of the Central Intelligence Agency; or

"(11) related to any internal operation, office management, or organization of the Central Intelligence Agency."; and

(7) by inserting before the period at the end of the second sentence a comma and the following: "except that no record of the Central Intelligence Agency shall be provided to any such person if any portion of such record is exempt under this subsection".

(c) Subsection (e) of section 552, title 5, United States Code, is amended to read as follows:

"(e) For purposes of this section—

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) the term 'clandestine collection' means the acquisition of intelligence information in ways designed to assure the secrecy of the operation;

"(3) the term 'covert operations' includes clandestine collection and special activities; and

"(4) the term 'special activities' means activities conducted abroad in support of national foreign policy objectives which are designed to further official United States programs and policies abroad and which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but not including diplomatic activity or the collection and production of intelligence or related support functions.".

97TH CONGRESS
1ST SESSION

S. 1247

To amend the Freedom of Information Act to provide a hearing for persons objecting to disclosure of private confidential information, to preserve the confidential status of certain kinds of private information contained in Government records, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 21 (legislative day, APRIL 27), 1981

Mr. DOLE (for himself, Mr. HATCH, Mr. LAXALT, Mr COCHRAN, Mr. LUGAR, Mr. SCHMITT, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Freedom of Information Act to provide a hearing for persons objecting to disclosure of private confidential information, to preserve the confidential status of certain kinds of private information contained in Government records, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Preservation of Confidential Information Act."

NOTICE OF REQUEST FOR DISCLOSURE AND INFORMAL HEARING PROCEDURE

SEC. 2. Section 552(a) of title 5, United States Code, is amended by inserting immediately after paragraph (6) the following new paragraph:

"(7)(A)(i) Whenever an agency receives a request for records which contain or are based on information not already in the public domain which has been obtained from any private source or which concerns any individually identifiable private party, and the agency has not decided to withhold such records, the agency shall, within ten working days from the date of receipt of such request, give written notice to the submitter of the information contained in the record, or on which the record is based, of such request. This notice shall describe the nature and scope of the request and advise the submitter of his right to submit written objections and his right to an informal ex parte hearing pursuant to this paragraph.

"(ii) For the purposes of this section, the terms 'private source' and 'private party' refer to any person (as defined by section 551 of this title) who is not an agency (as defined by this section), an officer or employee of such agency, or any instrumentality, officer, or employee of a State or local government.

"(iii) For the purposes of this section, the term 'submitter' includes the private source who provided the requested record, the information contained in the requested record or on which the requested record is based, the private proprietor of such information, and the individually identifiable private party who is the subject of such information.

"(B)(i) The submitter may, within ten working days after receipt of the notice, provide the agency with written objections to disclosure of the records requested, clearly and succinctly describing the factual and legal grounds for the objections.

"(ii) Upon proper request by the submitter made within five working days after receipt of the notice, the agency shall provide the submitter with an opportunity for an informal ex parte hearing at a location suitable for the interests of the submitter and of the agency, except that the agency may deny a request for hearing upon a written determination that on the particular facts of the case the request is clearly frivolous, the requested hearing would severely prejudice specifically stated interests of the agency or identified third parties, or the requested hearing has been rendered unnecessary by virtue of a determination to deny the underlying request for disclosure. This hearing shall be held no later than thirty days after the agency receives the request for a hearing, but

not earlier than a reasonable time for the submitter to prepare his presentation for the hearing.

"(iii) The time limits set forth in this subparagraph may be extended by the agency where required by the circumstances of the case to permit development of the evidence for the record or where required by other exceptional circumstances. When an agency extends such time limits, it shall make a written finding of such circumstances, specifically describing each such circumstance and why such circumstance justifies an extension of the applicable time limits. The agency shall send the submitter a copy of this finding by certified or registered mail.

"(C)(i) Within thirty days after the agency receives the written objections of the submitter, or, if an informal ex parte hearing was held, within thirty days after the conclusion of the hearing, the agency shall make a final decision regarding disclosure of the requested agency records, unless such time limitations are extended by the agency due to the existence of exceptional circumstances justifying such extension. When the agency extends such time limitations, it shall make a written finding of such circumstances, specifically describing each such circumstance and why such circumstance justifies an extension of the applicable time limits. The agency shall send the submitter a copy of this finding by certified or registered mail.

"(ii) When the agency makes its final decision, it shall give the submitter written notice of its decision by certified or registered mail. Where the agency has decided to disclose the records requested, this notice shall clearly describe the factual and legal grounds on which the agency based its decision.

"(D) An agency may not disclose records which are subject to the provisions of this paragraph unless—

"(i) more than ten working days have passed since the submitter received notice of the request for disclosure and the submitter has not provided the agency with written objections to the disclosure of the records requested or requested an informal ex parte hearing,

"(ii) more than ten working days have passed since the submitter received notice of the final decision of the agency following submission of written objections where the submitter has not requested an informal ex parte hearing, or where the request of the submitter for such hearing was denied, or

"(iii) more than ten working days have passed since the submitter received notice of the final decision of the agency following an informal ex parte hearing.

"(E)(i) Whenever an agency gives a submitter written notice of a request for agency records pursuant to this paragraph, the agency shall also give the requester written notice

by certified or registered mail that the record requested is subject to the provisions of this paragraph and that notice of the request is being given to the submitter: *Provided, however,* That such notice shall not describe or identify in any way the information contained in the requested record, or on which the record is based, or identify the submitter of such information.

"(ii) Whenever an agency grants the request of a submitter for an informal ex parte hearing, the agency shall give the requester written notice, by certified or registered mail, that an informal hearing will be held pursuant to the provisions of this paragraph.

"(iii) At the same time the agency gives notice of its decision to the submitter, the agency shall give a similar written notice of its decision to the requester by certified or registered mail. Where the agency has decided not to disclose the requested record or part thereof, the notice shall be made in such a manner so as not to prejudice in any way the status of the record, or part thereof, as exempt from the disclosure provisions of this section.

"(iv) Whenever an agency extends the time limitations set forth in subparagraphs (B) or (C), the agency shall send a copy of the written findings of exceptional circumstances to the requester by certified or registered mail at the same time such finding is sent to the submitter: *Provided, however,* That

the copy of such findings sent to the requester shall not prejudice in any way the status of the record, or part thereof, as exempt from the disclosure provisions of this section.

"(F) The requester may deem the request for disclosure of records denied if—

"(i) more than forty days after the requester received notice that the requested record was subject to the provisions of this paragraph, the requester has not received written notice that an informal ex parte hearing has been granted, written notice of the final decision of the agency, or a copy of the findings of exceptional circumstances requiring an extension of the time limits of subparagraphs (B) or (C); or

"(ii) more than sixty days after the requester received notice that an informal ex parte hearing has been granted, the requester has not received either written notice of the final decision of the agency or a copy of the findings of exceptional circumstances requiring an extension of the time limits of subparagraphs (B) or (C).

"(G) Any written finding made by an agency that exceptional circumstances require an extension of the time limits of subparagraphs (B) or (C) shall be subject to review in the district court of the United States in the district in which the complainant resides, or has his principal place of

business, or in which the agency records are located, or in the District of Columbia. If the reviewing court finds the challenged extension to be unwarranted by the facts, it may declare such extension invalid and order such relief as it deems proper, including initiating de novo review of the request for disclosure and the related objections of the submitter, pursuant to subparagraph (H), and ordering the award of attorney fees, pursuant to subparagraph (4)(E) of this section.

"(H)(i) Any determination made by an agency following the procedures provided by this paragraph to disclose all or part of the records requested to be disclosed shall be subject to de novo review in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records containing the information are situated, or in the District of Columbia. The district court may examine the contents of such records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action by a preponderance of the evidence.

"(ii) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this subsection, in which the complainant has substantially prevailed.

"(I) Nothing in this paragraph will be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.".

CONFORMING AMENDMENTS

SEC. 3. (a) Section 552(a)(3) of title 5, United States Code, is amended by inserting "and except as provided in paragraph (7) of this subsection" immediately after "this subsection".

(b) Section 552(a)(4)(B) of title 5, United States Code, is amended by striking out "On" at the beginning of subparagraph (B) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, on".

(c) Section 552(a)(6)(A) of title 5, United States Code, is amended by striking out "Each" at the beginning of subparagraph (A) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, each".

(d) Section 552(a)(6)(B) of title 5, United States Code, is amended by striking out "In" at the beginning of subparagraph (B) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, in".

(e) Section 552(a)(6)(C) of title 5, United States Code, is amended by striking out "Any" at the beginning of subparagraph (C) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, any".

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EXEMPTION FOR CONFIDENTIAL INFORMATION

SEC. 4. (a) Section 552(b) of title 5, United States Code, is amended by striking "This" at the beginning of subsection (b) and inserting in lieu thereof "The disclosure provisions of this".

(b) Section 552(b) of title 5, United States Code, is amended by striking paragraph (4) and inserting in lieu thereof the following:

"(4) subject to provisions of subsection (f), (A) trade secrets, (B) confidential or privileged commercial or financial information, (C) proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained, or (D) information which the agency in good faith has obligated itself not to disclose;".

(c) Section 552 of title 5, United States Code, is amended by inserting immediately after subsection (e) the following new subsection:

"(f) An agency shall not disclose any records containing or based on, information described under subsection (b)(4) unless—

"(1) the submitter of such information consents in writing to its disclosure;

"(2) the submitter of such information did not make a timely objection to its disclosure pursuant to the provisions of this section; or

"(3) the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure an overriding public interest.".

SEC. 5. Section 1905 of title 18, United States Code, is amended by adding to the end thereof "This section shall be deemed to fall within the provisions of section 552(b)(3) of title 5, United States Code.".

APPLICATION

SEC. 6. The provisions of this Act shall apply to requests for disclosure of agency records submitted after the effective date of this Act.

97TH CONGRESS
1ST SESSION

S. 1730

Entitled the "Freedom of Information Reform Act".

IN THE SENATE OF THE UNITED STATES

OCTOBER 7, 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

Entitled the "Freedom of Information Reform Act".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FEES AND WAIVERS

SEC. 2. Subparagraph (4)(A) of subsection 552(a) of title 5, United States Code, is amended to read as follows:

"(4)(A)(i) In order to carry out the provisions of this section, the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment and after consultation with the agencies, specifying uniform schedule of fees applicable so far as practicable to all

agencies, and referring specifically to any variances from such schedule for particular agencies—

"(a) such regulations shall not provide for any fees to be charged by any agency with respect to any request or series of related requests which requires no more than two hours of services by agency personnel to process and which results in making available copies of no more than twenty pages of records,

"(b) such regulations shall provide for reasonable standard charges for the cost of services by agency personnel in search, duplication, and other processing of such request, and for other costs incurred in processing the request. The term 'processing' does not include services of agency personnel in resolving issues of law and policy involved in a request, but may include examining records for possible withholding or deletions to carry out determinations of law or policy. Subject to the provision for free processing set forth in (a) above, such regulations may also provide for standard flat charges to categories having similar processing costs, and

"(c) such regulations, may, in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or acquired by the Government

at substantial cost to the public, provide for the charging of a fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking account of such factors as the estimated commercial value of the technological information, its cost to the Government, any public interest in encouraging its utilization, and other factors comparable to those set forth in the Federal user charge statute, section 483a of title 31, United States Code.

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

"(ii) Documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee meets a substantial public interest because furnishing the information can be considered as primarily benefiting the general public. In determining whether to waive or reduce a fee, an agency may consider the following:

"(a) the extent, if any, by which the cost of computing and collecting it may exceed the amount of the fee,

"(b) permitting use of this Act by indigent persons who might otherwise be unable to make a request due to insufficient funds,

"(c) the likelihood of dissemination to the public of significant information clearly and substantially benefiting public health or safety,

"(d) any indications that the requester has sought to formulate or reformulate a costly request so as better to specify, help locate, and process the records at less cost to the Government, and

"(e) the absence of indications that granting the request is likely to benefit the commercial or other private interests of the requester.

The Office of Management and Budget may make arrangement for the speedy, informal, equitable, and impartial resolution of disputes between requesters and agencies concerning fees and fee waivers under this subparagraph, but any such resolution may be reviewed and altered by a court in a suit under this section. In carrying out its functions under the preceding sentence, the Office of Management and Budget, shall solicit and be furnished appropriate cooperation by all agencies, particularly the Office of Management and Budget, the Office of Personnel Management, the Administrative Conference of the United States, and the National Archives and Records Service. Fees for services pursuant to this subparagraph may be charged for services performed after the filing of suit under this section unless the court in such suit shall otherwise direct.

"(iii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund.".

TIME LIMITS

SEC. 3. Paragraph (6) of subsection (a) of title 5, United States Code, is amended to read as follows:

"(6)(A) Except as otherwise provided in this paragraph, each agency, upon request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions

for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as defined in this subparagraph and as further specified in regulations to be issued by the Attorney General after notice and hearing, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than an aggregate of sixty working days with respect to any request, including any appeal pertaining thereto. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein;

"(iv) a request which the head of the agency has specifically stated in writing would, if given priority for processing, substantially obstruct and impair the urgent performance of a statutory agency function in aid of the public health, safety, or welfare, the national economy, law enforcement, or the national defense of foreign relations;

"(v) a request for records involving private business or personal information, the proper processing of which involves balancing the interests of the requester and the submitter or subject of the information and the solicitation and appraisal of further information and views from such persons; or

"(vi) a major, abrupt, and unexpected increase in the number of requests or appeals received by an agency, creating a substantial backlog requiring processing on a generally first-come-first-serve basis except hardship cases.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administration remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Where an agency in such exceptional circumstances is exercising due diligence but cannot be allowed additional time because the matter is not in court, the agency shall provide the requester with a notice of the exceptional circumstances and the due diligence which pertain to the request, together with its best estimate of when a determination on such request will be made. Such notice and the circumstances relating to it—

"(i) shall not delay or prevent the filing of a suit under this section or bind a court on the question whether administrative remedies have been exhausted, and

"(ii) may be considered by a court in ruling on whether the agency should be allowed additional time, and until a court rules on this issue an agency shall

not be considered to have violated the otherwise applicable time limits.

Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.".

DUPLICATIVE REQUESTS

SEC. 4. Section 552(a) of title 5, United States Code is amended by adding at the end thereof the following new paragraph:

"(7) In any case in which a portion of the records requested under this subsection consist of newspaper clippings, magazine articles, court records, or any other item which is a public record or otherwise available in public records, the agency shall not be required to copy that portion of the record but may identify such portions by date and source.

"(8) In order to encourage more efficient administration of this section and avoid unnecessary duplication of effort, any person making a request to an agency for records under this section may be asked to state the number of other requests under this section that such person has made within the past two years, the agency to which these were made, and the date of each such request. In any case in which a

person makes successive or multiple requests on the same general subject within a two-year period (a) an agency may arrange with other agencies from which the person requested records on the same general subject, or which hold requested records, for consolidated or coordinated responses, and (b) any agency shall not be required to copy any portion of the records previously furnished to the requestor but shall only be required to update the response with any requested material which is available and was not previously furnished. As used in this paragraph, 'person' includes agents of a person or two or more persons acting in concert, and the term 'the same general subject' includes substantially similar or related subjects. Each agency head may promulgate regulations, subject to the control of the Attorney General, to assist in the administration of this paragraph.".

CLARIFY EXEMPTIONS

SEC. 5. Section 552(b) of title 5, United States Code, is amended to read as follows:

"(b) The compulsory disclosure requirements of this section do not apply to matters that are—".

REASONABLY SEGREGABLE

SEC. 6. Insert after the last sentence in 552(b) the following: "In determining which portions of records are reasonably segregable, the following may be considered—

"(a) any public interest in the release of such portions,

"(b) their intelligibility or other value to the requester,

"(c) the degree to which such portions are readily severable from the balance of the records and any significant costs in making such severed portions available,

"(d) whether the information in such portions otherwise is available to the requester or can be provided, and

"(e) in the case of records containing matter covered by exemptions 1 or 7 of this subsection, the degree of risk that there may be persons who have such significant information or expertise on the subject of the record as to render deletions of only matter that the agency can prove to be exempt ineffective to protect exempt information which may be derived from such record.".

MANUALS AND ROSTERS

SEC. 7. Section 552(b)(2) of title 5, United States Code, is amended by adding at the end thereof a comma and the following: "including manuals and instructions to investigators, inspectors, auditors, negotiators, or protective officers, guidelines for the allocation of prosecutorial resources, and

examination material used solely to determine individual qualifications for employment, promotion, or licensing, the disclosure of which would jeopardize law enforcement, negotiations, protection of Government officials, or examinations, and further, including reports describing the vulnerability to criminal interference of facilities or activities of Government or of persons engaged in interstate or foreign commerce.".

BUSINESS CONFIDENTIALITY

SEC. 8. Section 552(b)(4) of title 5, United States Code, is amended to read as follows:

"(4) trade secrets and commercial research, or financial information, or other commercially valuable information obtained from any person and privileged or confidential where release may impair the legitimate private, competitive, financial, research, or business interests of any person or where release may impair the government's ability to obtain such information in the future;".

BUSINESS CONFIDENTIALITY PROCEDURES

SEC. 9. Section 552(a) of title 5, United States Code, is amended by inserting immediately after paragraph (6) the following new paragraph:

"(7)(A)(i) Whenever an agency receives a request for records containing or based on information which is or may be subject to exemption 4 (5 U.S.C. 552(b)(4)) and the

agency has not decided to withhold such records, the agency shall, within ten working days from the date of receipt of such request, give written notice to the submitter of the information contained in the record, or on which the record is based, of such request. This notice shall describe the nature and scope of the request and advise the submitter of his right to submit written objections and his right to an informal ex parte hearing pursuant to this paragraph.

"(ii) For the purposes of this section, the term 'submitter' includes the private source who provided the requested record or the information contained in the requested record or on which the requested record is based, the private proprietor or such information, and the individually indentifiable private party who is the subject of such information.

"(B)(i) The submitter may, within ten working days after receipt of the notice, provide the agency with written objections to disclosure of records requested, clearly and succinctly describing legal grounds for the objections.

"(ii) Upon proper request by the submitter made within five working days after receipt of the notice, the agency shall provide the submitter with an opportunity for an informal ex parte hearing at a location suitable for the interests of the submitter and of the agency, except that the agency may deny a request for hearing upon a written determination that on the particular facts of the case the request is clearly frivo-

lous, the requested hearing would severely prejudice specifically stated interests of the agency or identified third parties, or the requested hearing has been rendered unnecessary by virtue of a determination to deny the underlying request for disclosure. This hearing shall be held no later than thirty days after the agency receives the request for a hearing, but not earlier than a reasonable time for the submitter to prepare his presentation for the hearing.

"(iii) The time limits set forth in this subparagraph may be extended by the agency where required by the circumstances of the case to permit development of the evidence for the record or where required by other exceptional circumstances. When an agency extends such time limits, it shall make a written finding of such circumstances and why such circumstances justifies an extension of the applicable time limits. The agency shall send the submitter a copy of this finding by certified or registered mail.

"(C)(i) Within thirty days after the agency receives the written objections of the submitter, or, if an informal ex parte hearing was held, within thirty days after the conclusion of the hearing, the agency shall make a final decision regarding disclosure of the requested agency records, unless such time limitations are extended by the agency due to the existence of exceptional circumstances justifying such extension. When the agency extends such time limitations, it shall make a

written finding of such circumstances and why such circumstances justifies an extension of the applicable time limits. The agency shall send the submitter a copy of this finding by certified or registered mail.

"(ii) When the agency makes its final decision, it shall give the submitter written notice of its decision by certified or registered mail. Where the agency has decided to disclose the records requested, this notice shall clearly describe the factual and legal grounds on which the agency based its decision.

"(D) An agency may not disclose records which are subject to the provisions of this paragraph unless—

"(i) more than ten working days have passed since the submitter received notice of the request for disclosure and the submitter has not provided the agency with written objections to the disclosure of the records requested or requested an informal ex parte hearing.

"(ii) more than ten working days have passed since the submitter received notice of the final decision of the agency following submission of written objections where the submitter has not requested an informal ex parte hearing, or where the request of the submitter for such hearing was denied, or

"(iii) more than ten working days have passed since the submitter received notice of the final decision of the agency following an informal ex parte hearing.

"(E)(i) Whenever an agency gives a submitter written notice of a request for agency records pursuant to this paragraph, the agency shall also give the requester written notice by certified or registered mail that the record requested is subject to the provisions of this paragraph and that notice of the request is being given to the submitter: *Provided, however,* That such notice shall not describe or identify in any way the information contained in the requested record or on which the record is based, or identify the submitter of such information.

"(ii) Whenever an agency grants the request of a submitter for an informal ex parte hearing, the agency shall give the requester written notice, by certified or registered mail, that an informal hearing will be held pursuant to the provisions of this paragraph.

"(iii) At the same time the agency gives notice of its decision to the submitter, the agency shall give a similar written notice of its decision to the requester by certified or registered mail. Where the agency has decided not to disclose the requested record or part thereof, the notice shall be made in such a manner so as not to prejudice in any way the status

or content of the record, or part thereof, as exempt from the disclosure provisions of this section.

"(iv) Whenever an agency extends the time limitations set forth in subparagraphs (B) or (C), the agency shall send a copy of the written findings of exceptional circumstances to the requester by certified or registered mail at the same time such finding is sent to the submitter: *Provided, however,* That the copy of such findings sent to the requester shall not prejudice in any way the status or content of the record, or part thereof, as exempt from the disclosure provisions of this section.

"(F) The requester may deem the request for disclosure of records denied if—

"(i) more than forty days after the requester received notice that the requested record was subject to the provisions of this paragraph, the requester has not received written notice that an informal ex parte hearing has been granted, written notice of the final decision of the agency, or a copy of the findings of exceptional circumstances requiring an extension of the time limits of subparagraphs (B) or (C); or

"(ii) more than sixty days after the requester received notice that an informal ex parte hearing has been granted, the requester has not received either written notice of the final decision of the agency or a

copy of the findings of exceptional circumstances requiring an extension of the time limits of subparagraphs (B) or (C).

"(G) Any written finding made by an agency that exceptional circumstances require an extension of the time limits of subparagraphs (B) or (C) shall be subject to review in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are located, or in the District of Columbia. If the reviewing court finds the challenged extension to be unwarranted by the facts, it may declare such extension invalid and order such relief as it deems proper, including initiating de novo review of the request for disclosure and the related objections of the submitter, pursuant to subparagraph (H), and ordering the award of attorney fees, pursuant to subparagraph (4)(E) of this section.

"(H)(i) Any determination made by an agency following the procedures provided by this paragraph to disclose all or part of the records requested to be disclosed shall be subject to de novo review in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records containing the information are situated, or in the District of Columbia. The district court may examine the contents of such records in camera to determine whether such records or any

part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action by a preponderance of the evidence.

"(ii) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this subsection, in which the complainant has substantially prevailed.

"(I) Nothing in this paragraph will be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.".

CONFORMING AMENDMENTS FOR BUSINESS CONFIDENTIALITY PROCEDURES

SEC. 10. (a) Section 552(a)(3) of title 5, United States Code, is amended by inserting "and except as provided in paragraph (7) of this subsection" immediately after "this subsection".

(b) Section 552(a)(4)(B) of title 5, United States Code, is amended by striking out "On" at the beginning of subparagraph (B) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, on".

(c) Section 552(a)(6)(A) of title 5, United States Code, is amended by striking out "Each" at the beginning of subparagraph (A) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, each".

(d) Section 552(a)(6)(B) of title 5, United States Code, is amended by striking out "In" at the beginning of subparagraph (B) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, in".

(e) Section 552(a)(6)(C) of title 5, United States Code, is amended by striking out "Any" at the beginning of subparagraph (C) and inserting in lieu thereof "Subject to the provisions of paragraph (7) of this subsection, any".

PERSONAL PRIVACY

SEC. 11. Section 552(b)(6) of title 5, United States Code, is amended to read as follows:

"(6) disclosures, including but not limited to disclosures from personnel and medical files and from rosters of law enforcement personnel or personnel of any national intelligence agency, if the disclosure would constitute a clearly unwarranted invasion of personal privacy: As used herein, a disclosure would be an 'invasion of personal privacy' if the individual could reasonably object to it because of intimacy or possible adverse effects on himself or his family, and it would be 'clearly unwarranted' if the detriments of the disclosure are not outweighed by its benefits to the public interest;".

EXEMPTION 7

SEC. 12. Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) subject to the provisions of subsection (f), records maintained, collected, or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than twenty-five years, (D) tend to disclose the identity of a confidential source, including a State, local, or foreign government which furnished information on a confidential basis, and, in case of a record maintained, collected or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of any natural person.".

FELONS

SEC. 13. Section 552(a)(3) of title 5, United States Code, is amended by adding at the end thereof the following: "The Office of Management and Budget, in accordance with public rulemaking procedures set forth in section 553 of this title may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under section 552a of this title shall be made available to requesters who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (a) appropriate in the interests of law enforcement, of foreign relations and national defense, or of the efficient administration of this section, and (b) not in substantial derogation of the public information purposes of this section.".

REPORTING UNIFORMITY

SEC. 14. Section 552(d) of title 5, United States Code, is amended as follows:

(a) The first sentence of section 552(d) of title 5, United States Code, is amended by substituting in lieu of the words before "Speaker" the following: "On or before December 1 of each calendar year, each agency shall submit a report covering the preceding fiscal year to the".

(b) The last paragraph of 552(d) is amended by substituting "December" for "March" and by substituting for the word "calendar" the second time it appears the word "fiscal".

II

97TH CONGRESS
1ST SESSION

S. 1751

To amend the Freedom of Information Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 20 (legislative day, OCTOBER 14), 1981

Mr. HATCH (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Freedom of Information Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Information Improvements Act of 1981".

AMENDMENTS RELATING TO THE OBLIGATION TO MAKE RECORDS AVAILABLE

SEC. 2. Section 552(a) of title 5, United States Code, is amended—

(a) in paragraph (2)—

(1) by adding in subparagraph (A) ", if the final opinions or orders are cited, used, or relied on as precedent by the agency" after "cases"; and

(2) by striking out "a clearly unwarranted" in the second sentence and inserting in lieu thereof "an unwarranted";

(b) by amending paragraph (3) to read as follows:

"(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by any United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester.

"(B) A requester shall not make or maintain a request under this paragraph for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party.

"(C) An agency may require by regulation that each request for records under this section include declarations by the requester that the requester, or any person upon whose behalf the requester acts in making the request, is—

"(i) a United States person as defined in this section, and

"(ii) not barred by subsection (a)(3)(B) from making the request.

A request that does not comply with any such regulation requirement is not a proper request under this section."; and

(c) by adding the following new paragraphs at the end thereof:

"(7) An agency is not required to disclose any material requested under this subsection which consists of newspaper clippings, magazine articles, court records, publications available from the Government Printing Office, or any similar items which are in the public record or otherwise publicly available, but the agency shall inform the requester of the nature of such public source materials.

"(8) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.".

AMENDMENTS RELATING TO FEES

SEC. 3. Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended—

(a) by striking out the second sentence and inserting in lieu thereof the following: "The schedule may provide for the payment of all costs reasonably attributable to responding to the request, including the costs of searching for, reviewing, and duplicating requested records. If the requested records contain commercially valuable technological or reference information, generated or acquired by the Government at substantial cost to the public, fees may be charged which reflect the fair market value or royalties or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the information, its cost to the Government, and any public interest served by its disclosure."; and

(b) by adding after the word "determines" in the last sentence ", in the exercise of its discretion,".

AMENDMENTS RELATING TO THE ADMINISTRATIVE RIGHTS OF SUBMITTERS OF INFORMATION

SEC. 4. Paragraph (4) of section 552(a) of title 5, United States Code, is amended—

(a) by redesignating subparagraph (B) as subparagraph (E), and by redesignating subparagraphs (C) through (G) as subparagraphs (J) through (N), respectively; and

(b) by adding after subparagraph (A) the following new subparagraphs:

"(B) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

"(i) a submitter may be required to designate, at the time of submission, any information consisting of trade secrets, commercial or financial information, or other commercially valuable information, which is exempt from disclosure under subsection (b)(4);

"(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter within a reasonable time prior to a decision to release any such information;

"(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure specifying all grounds upon which it is contended that the information should not be disclosed; and

"(iv) the agency shall notify the submitter of any final decision to release such information.

"(C) An agency is not required to notify a submitter pursuant to subparagraph (B) if—

"(i) the information requested is not designated by the submitter as exempt from disclosure in accordance

with agency regulations promulgated pursuant to paragraph (4)(B)(i), if such designation is required by the agency;

"(ii) the agency determines, prior to giving such notice, that the request should be denied;

"(iii) the disclosure is required by law (other than this section); or

"(iv) the information lawfully has been published or otherwise made available to the public.

"(D) If a submitter has objected, pursuant to subparagraph (B)(iii), to disclosure of information that the agency determines to be exempt from disclosure under subsection (b)(4), the agency shall not release such information unless the agency determines in writing that the failure to disclose the records would injure an overriding public interest and disclosure is not otherwise prohibited by law.".

AMENDMENTS RELATING TO JUDICIAL REVIEW

SEC. 5. Paragraph (4) of section 552(a) of title 5, United States Code, is amended—

(a) by amending redesignated subparagraph (E) to read as follows:

"(E) On complaint filed by a requester within ninety days from the date of final agency action or by a submitter prior to the release of submitted information, the district court of the United States in the district in which the com-

plainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

"(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester; or

"(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under subparagraph (B)(iii) or which would have been objected to had notice been given as required by subparagraph (B)(ii).";

(b) by adding after subparagraph (E) the following new subparagraphs:

"(F) In an action based on a complaint—

"(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

"(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

"(G) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

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"(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

"(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(H) In any action in which a requester is an intervenor or is joined the court shall on timely motion of the requester transfer the action to a district court which would have had jurisdiction had the action been brought by the requester, unless the court otherwise directs for good cause shown.

"(I) In a case in which a record is withheld under subsection (b)(1), the court shall not enjoin the agency from withholding such record unless the agency's action is found to be arbitrary or capricious. In all other cases, the court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information. The court shall maintain under seal any affidavit or record submitted in camera to the court in support of the applicability of any exemption, and

shall stay any order requiring the release of records pending final judicial resolution of any appeal from such order."; and

(c) in redesignated subparagraph (L)—

(1) by adding "or any submitter who is a party to the litigation" after "United States"; and

(2) by striking out "complainant" and inserting in lieu thereof "requester".

AMENDMENTS RELATING TO THE TIME FOR AGENCY RESPONSE

SEC. 6. Paragraph (6) of section 552(a) of title 5, United States Code, is amended—

(a) in subparagraph (A)—

(1) by striking out "for records made under paragraph (1), (2), or (3) of this subsection" and inserting in lieu thereof "made under paragraph (1), (2), or (3) of this subsection for records which are sufficiently identified and limited that no more than eight working hours of search and review time are required to respond to the request, and which do not contain trade secrets, commercial or financial information, or other commercially valuable information provided by a submitter";

(2) in clause (i), by striking out "ten days (excepting Saturdays, Sundays, and legal public

holidays)" and inserting in lieu thereof "ten working days"; and

(3) in clause (ii), by striking out "twenty days (excepting Saturdays, Sundays, and legal public holidays)" and inserting in lieu thereof "twenty working days";

(b) by amending subparagraph (B) to read as follows:

"(B) Except as provided in subparagraph (A), each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) within thirty working days after the receipt of the request—

"(a) determine whether to comply with such request, in whole or in part, and immediately notify the requester of such determination and the reasons therefor, and of the requester's right to appeal to the head of the agency any adverse determination; or

"(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed one year; and

"(ii) within thirty working days after the receipt of an appeal—

"(a) make a determination of the appeal; or

"(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed six months.

If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.";

(c) by redesignating subparagraph (C) as subparagraph (E);

(d) by adding the following new subparagraphs after subparagraph (B):

"(C) Each agency shall promulgate regulations pursuant to notice and receipt of public comment, specifying the time periods under subparagraph (B). Such regulations shall provide for the shortest practicable time periods and shall take into account all relevant factors, including but not limited to—

"(i) the volume of requests and appeals received by the agency;

"(ii) the resources available to the agency for the processing of such requests and appeals;

"(iii) the volume of records required to be searched to locate all records responsive to the request or appeal;

"(iv) the volume of responsive records required to be reviewed for release pursuant to the request or appeal;

"(v) the need to search for or review records maintained in field facilities or other establishments that are separate from the agency office processing the request or appeal;

"(vi) the character of the records requested;

"(vii) the need for consultation, which shall be conducted with all practicable speed, with another agency or among two or more components of the agency having substantial subject matter interest therein; and

"(viii) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters.

"(D) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records and whose request for information will pri-

marily benefit the general public may, as a matter of the agency's discretion, be given processing priority over other requesters."; and

(e) in redesignated subparagraph (E)—

(1) by striking out "person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and inserting in lieu thereof "requester";

(2) by adding after the first sentence the following new sentence: "If a requester files a complaint under paragraph (4)(E), the administrative remedies of a submitter of information contained in the records which are the subject of the request shall be deemed to have been exhausted."; and

(3) in the next to last sentence, by striking out "such person making such request" and inserting in lieu thereof "the requester, except that if the disclosure of records is objected to by a submitter pursuant to paragraph (4)(B)(iii), the agency shall not disclose the records for fifteen working days after notice of the final decision to release the requested information has been forwarded to the submitter.".

AMENDMENTS RELATING TO EXEMPTIONS

SEC. 7. Section 552(b) of title 5, United States Code, is amended as follows:

(a) Paragraph (2) is amended by adding ", including such materials as (A) manuals and instructions to investigators, inspectors, auditors, and negotiators, and (B) examination material used solely to determine individual qualifications for employment, promotion, and licensing" after "agency".

(b) Paragraph (4) is amended to read as follows:

"(4) trade secrets, and commercial or financial information or other commercially valuable information obtained from any person if the information is privileged or if its release may impair either the legitimate competitive, financial, or business interests of any person or the Government's ability to obtain such information in the future;".

(c) Paragraph (6) is amended to read as follows:

"(6) records or information concerning individuals the release of which would constitute an unwarranted invasion of personal privacy, including compilations or lists of names and addresses that could be used for solicitation purposes;".

(d) Paragraph (7) is amended—

(1) in the introductory language—

(A) by striking out "investigatory records" and inserting in lieu thereof "records or information"; and

(B) by adding "or information" after "such records";

(2) by amending clause (A) to read as follows: "(A) reveal investigatory information relating to an ongoing investigation or enforcement proceeding,";

(3) by amending clauses (D), (E), and (F) to read as follows: "(D) tend to disclose the identity of a confidential source, including any foreign, state, or other public agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) disclose techniques, procedures, guidelines, or priorities for law enforcement investigations or prosecutions, (F) endanger the life or physical safety of any natural person, or"; and

(4) by adding the following new clause at the end thereof: "(G) disclose information relating to such categories of investigations of terrorism, organized crime,

or foreign counterintelligence as are defined by the Attorney General by regulation or order;".

(e) Paragraph (8) is amended by striking out "or" at the end thereof.

(f) Paragraph (9) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon.

(g) Subsection (b) is amended by adding the following new paragraphs after paragraph (9):

"(10) records generated by the United States or any party in connection with the settlement of a legal action in which the United States is a party or has an interest; or

"(11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license from an agency, unless the requester has obtained the appropriate approval, authorization, or license.".

AMENDMENTS RELATING TO REPORTING REQUIREMENTS

SEC. 8. Section 552(d) of title 5, United States Code, is amended—

(a) by striking out "calendar" the second and fourth places it appears and inserting in lieu thereof "fiscal";

(b) in paragraph (4), by striking out "subsection (a)(4)(F)" and inserting in lieu thereof "subsection (a)(4)(M)"; and

(c) in the next to the last sentence, by striking out "subsections (a)(4) (E), (F), and (G)" and inserting in lieu thereof "subsections (a)(4) (L), (M), and (N)".

AMENDMENTS RELATING TO DEFINITIONS

SEC. 9. Section 552(e) of title 5, United States Code, is amended to read as follows:

"(e) For purposes of this section—

"(1) 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) 'submitter' means any person who has submitted to an agency (other than an intelligence agency) trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information, in which the person has a commercial or proprietary interest;

"(3) 'requester' means any person who makes or causes to be made, or on whose behalf is made, a

proper request for disclosure of records under subsection (a);

"(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, section 1101(a)(20) of title 8, United States Code, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

"(5) 'working days' means every day excluding Saturdays, Sundays, and Federal legal holidays;

"(6) 'record' means existing documentation of information in any form, including computer tapes and discs, but does not include system software in any form or documentation created for the personal convenience of any Government employee or official.".

Senate HATCH. We have an excellent group of witnesses here today. I have a couple of problems that I have to put up with. One is that today I have to introduce at the only time available to me on the floor the Radiation Exposure Compensation Act, the bill to compensate those who were exposed to radiation in the fifties and sixties as a result of the atmospheric tests in Nevada.

It is a very important bill, certainly to my State and I believe for the whole country, because it sets some standards that the Federal Government, if it is negligent, ought to be just as responsible for its own liability as you and I as private citizens. I believe that is a hallmark of our law, but nevertheless, in this area without this type of a bill the responsibility of the Federal Government might never be served.

I may have to have staff take some testimony for about half an hour of this morning's testimony. I hope that the witnesses will understand, but I have no choice other than to do that.

I do have Senator DeConcini. We will ask you to preside over the subcommittee, if you would, between 10 and 10:30. Could you do that for me?

Senator DECONCINI. I will be glad to do it for as long as I can.

Senator HATCH. I always like to see Senator DeConcini preside. He has always been so fair when he presided over the last couple of years.

Senator DeConcini?

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much. I will be very brief and I will submit a statement for the record.

I would like to compliment you and the staff for putting together these oversight hearings in this very important area. The area I am most familiar with is the abuse of the Freedom of Information Act in law enforcement, which you noted in your statement. I think it is worthwhile that we pursue resolution of this and other problems plaguing FOIA.

This act indeed has brought openness to Government; an openness that is necessary and which must not be set aside completely. On the other hand, sometimes we strive to insure individual freedom and we end up hurting those whom we really want to protect, the vast majority of our society.

I feel that we have an opportunity in the next several days, Mr. Chairman, to study this subject matter, and to make some fine-tuning and corrective measures. I compliment you for being the leader in this area and bringing it before the Judiciary Committee, in an effort to see what we can do to provide the necessary tools without extracting those valued freedoms that we all profess and try to maintain.

I thank the chairman.

[The prepared statement of Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Thank you Mr. Chairman, and I commend you for addressing the complex issues involved in S. 1247 which proposes to amend the (b)(4) exception to the Freedom of Information Act.

As you have noted, Mr. Chairman, significant questions are raised by the proposed bills arising from the conflict between the desirability of public access to Government documents, on the one hand, and the need of Government and private entities to preserve the confidentiality of certain types of information in the possession of Government, on the other.

The section (b) exemptions to 5 U.S.C. 552 were drafted as an attempt to resolve the conflicts between these competing interests. The goal of these exemptions was to strike a balance between the people's right to know, and the preservation of confidential information, the disclosure of which is contrary to the national interest.

Section (b) is not perfect. One of the areas in which there has been frequent abuse involves section (b)(4). The resulting disclosure of certain information has been both detrimental to the national interest, and extremely damaging to private business. I believe that the (b)(4) trade secrets exception is one of those areas in which FOIA discloses too much information to the ultimate detriment of the public.

The research I have seen indicates that the (b)(4) exception has not successfully achieved its purpose in its present form. There are numerous examples where the work product of businesses, often the result of years of research and done at great expense, were submitted to the Government in compliance with Federal regulations, that were ultimately transmitted to competitors under the Freedom of Information Act. While this is a serious problem when the trade secrets are disclosed to U.S. firms, the problem becomes critical when these secrets are released to foreign business, as is often the case under the present (B) (4) exception.

Mr. Chairman, I believe that we are in general agreement that FOIA in some form is a desirable and necessary tool in maintaining Government accountability. It may well be that these problems are the price we pay to assure the free flow of information. I personally believe that we can make some adjustments to the FOIA exceptions which alleviate the problem areas, without restricting the public's ability to obtain information from its Government.

The question which is before us is whether the proposed revisions before this committee are proper adjustments to the current exceptions. I look forward with great interest to the testimony today in the hope that some of the questions about the current proposed revisions may be resolved.

Mr. Chairman, before we proceed, I would like to submit for the record a report entitled News Media Access to Federal Trade Commission Records and an explanatory letter which I received from our colleague, Senator Sasser.

Senator HATCH. Thank you, Senator DeConcini.

Our first witness today is Robert L. Saloschin. Mr. Saloschin graduated from the Columbia Law School, where he was an editor of the Law Review. He has had a distinguished career as a practicing lawyer, serving as a Justice Department lawyer from 1958 until retirement just a few months ago. He now practices with the firm of Lerch, Early & Roseman.

At Justice, Mr. Saloschin worked with the Office of Legal Counsel from 1958 until 1978. In 1969 he was made chairman of the Freedom of Information Committee, which advises Federal agencies on public requests for access to their records. He served in that position until this year.

From 1978 until he retired, Mr. Saloschin was Director of the Office of Information Law and Policy, which was created in 1978 to provide the Government with guidance on legal and policy matters involving the Freedom of Information Act.

During his service at Justice, Mr. Saloschin received the Meritorious Service Award, the Special Commendation Award, the John Marshall Award, and the Outstanding Performance Certificate. He has frequently lectured on freedom of information legal problems at seminars and bar association meetings for lawyers and Federal judges, and has published many professional articles on the subject.

He has been regarded as the Government's leading expert on freedom of information law.

Mr. Saloschin, we will be happy to take your testimony at this time.

If I can apologize, I am going to stay until about 5 minutes to 10, and then I have to run to the floor. I will be back pretty close to 10:30. I will have to have staff take the testimony until I return. They will go ahead with the second witness, who will be Mr. William Taft. If I am here, I may want to put some of the Society of Professional Journalists before Mr. Taft. If I am not back yet, proceed with Mr. Taft.

Mr. Saloschin?

STATEMENT OF ROBERT L. SALOSCHIN, FIRM OF LERCH, EARLY & ROSEMAN, BETHESDA, MD.

Mr. SALOSCHIN. Mr. Chairman and members of the subcommittee, let me thank you for this opportunity to participate in these hearings. I had mixed feelings, including a twinge of guilt, when I retired from the Justice Department at the very time when prospective changes in the Freedom of Information Act, which I shall call FOIA, would soon require the attention of the new executive and legislative leadership. Therefore, I feel that I have a civic duty to help where I can.

As of this date, neither I nor my law firm, Lerch, Early & Roseman of Bethesda, represent any client for the purpose of either supporting or opposing amendments to the Freedom of Information Act.

Let me begin with four preliminaries: a few remarks on the importance of FOIA, a few remarks on my own background so that you can better appraise my testimony, a brief attempt to identify the basic or underlying issue in this field, and then my own conclusion on that issue. The main body of my statement will discuss seven major areas where legislative changes in FOIA should be considered.

IMPORTANCE OF FOIA

FOIA's importance can be seen from several perspectives: history, comparative government, its sheer magnitude, its central objectives, and the other major public and private values with which FOIA must be reconciled.

Historically, FOIA is with us at a time of explosive growth in information handling technology—computers and communications—and in the amount of information itself. In a period which some call the information age, the success or even the survival of individuals and institutions may increasingly depend upon obtaining access or preventing others from obtaining access to information, much of it held by the Government.

Other great democracies are watching FOIA, including Canada, Australia, Japan, and several European nations. Part of their interest has to do with FOIA's effects on transnational movements of information in areas such as finance, trade, technology, law enforcement, and national security. Part of their interest is to develop their own FOIA's in the light of our experience.

FOIA's sheer magnitude should not be forgotten. It applies to uncounted billions of records reflecting everything the Federal Government has been involved in. It includes more than a thousand Federal court decisions with judicial opinions, including a dozen in the Supreme Court.

FOIA's original and central objectives are important to help the success and survival of our free society by making popular Government work better, through a better informed electorate and through better public accountability of Government agencies.

The major public and private values with which FOIA must be reconciled can be identified from the statute itself. The act seeks to strike a balance, which from time to time may need adjustment by Congress, between the public's right to know and the safeguarding of these other major values, which I call "protectable interests."

While in legal terms, FOIA has nine exemptions that permit withholding, these nine exemptions represent five great protectable interests: one, the public's interest in national security; two, the public's interest in law enforcement; three, the public's interest in Government efficiency, particularly in the quality of agency decision making; four, the private sector interest in business confidentiality; and, five, the private sector interest in individual or personal privacy.

BACKGROUND OF WITNESS

Although my background is not purely that of a Government lawyer, I have worked for 35 years in the Government, the last 22 in the Justice Department, and the last 12 in freedom of information on a full-time and sometimes an overtime basis. Since the chairman summarized this, I will leave in my prepared testimony the remainder of this summary.

THE UNDERLYING ISSUE

Let me turn to the underlying issue. I suggest that the basic issue before you is what changes should Congress make so that FOIA will produce the best mixture of results that is reasonably practicable. By the best mixture, I refer to all results of FOIA that are either beneficial or detrimental to our ultimate national goal of preserving and improving a free, prosperous, and secure society in today's complex and turbulent world.

In 1974, the focus of congressional attention was only to maximize FOIA's benefits. Today the primary concern is to minimize the detriments.

To formulate the basic issue as I have done may sound like a cost-benefit analysis, but some of the more significant costs and benefits are extremely difficult to measure with any accuracy in quantitative terms.

For example, on the benefit side, how do you measure the value to citizens and taxpayers of a law which anyone can use to expose governmental waste, fraud, abuse, favoritism, and corruption? How do you measure the value of a law under which useful information for health, safety, and productivity, which the Government has acquired at public expense, is available to the public? How do you measure the value of a law which gives responsible and patriotic

citizens enforceable assurances that discussions and debates on public policies can be not only free but also well-informed?

But on the other side, how do you measure the cost to the Nation of a law with chilling effects on sources who have important information for foreign intelligence or law enforcement or other Federal functions, but hesitate to provide it because they fear possible disclosure under FOIA may seriously hurt them? How do such costs relate, for example, to the national cost of interstate theft, or to the cost of a serious international setback in economic or strategic matters? How can you measure the cost in dollars, morale, and effects on the public of diverting agency staffs away from the work which Congress expects them to perform by making them process large and burdensome FOIA requests made for purely private purposes in order to obstruct, harass, and delay legitimate agency activity?

My response is that FOIA needs substantial amendments in several areas which I will discuss, but FOIA should not be repealed or seriously crippled as an effective instrument for its original objectives. This means preserving FOIA's chief fundamentals, including, for example, that it applies to all records that belong to an agency and makes them available except as exempt, and that there is effective judicial review of agency withholding with the burden on the agency to justify it.

It is true that our country managed pretty well for most of its 200 years without FOIA. However, the same can also be said of indoor plumbing, women's suffrage, and cars, planes and radios. We do not abandon advances because they have problems. We try to correct the problems.

NATIONAL SECURITY INFORMATION

Now let me turn to the seven areas for possible amendments. One: Is the protectable interest in national security information. We are 6 percent of the world's population living in an unstable world. It is vital that our Government continue to conduct as effectively as possible its military, diplomatic, and other international activities, including foreign intelligence.

Mr. Carlucci, when he was deputy director of the CIA, testified before congressional committees on the problems for foreign intelligence collection of the "perceptions" by our potential sources of intelligence of FOIA related risks to them in providing our Government with information. Although he indicated the actual likelihood of such risks may be slight, the fear of the potential source, and the severity of possible damage to the source and his family, are so drastic that the source is chilled.

LAW ENFORCEMENT INFORMATION

Two: Is the protectable interest in law enforcement information. In addition to crime's tragic effects on its victims, it is a significant drain on our national economy. Law enforcement largely depends on cooperation by sources. However, because of fears of embarrassment or reprisals, information will often be provided only if the source is guaranteed that his or her identity will remain secret.

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In 1979, FBI Director Webster furnished about 125 actual illustrations, with names deleted, of refusals to provide information to the FBI by various persons, including a Federal judge, for fear of disclosure of the source's identity under FOIA or the Privacy Act. Again, while the actual risk of disclosing these sources may be small, the perception or fear of possible disclosure may result in silence. The result is less effective law enforcement.

Numerous draft amendments have been devised to reduce the impact of FOIA on criminal law enforcement. Some of these amendments are better than others in offering effective protection without ignoring other factors such as the public's interest in significant investigations like those of Alger Hiss and Julius and Ethel Rosenberg. Suffice it for today that there is a real need for careful legislative attention and appropriate action on FOIA's effects upon law enforcement.

BUSINESS INFORMATION

Three: The protectable interest in business confidentiality. There are many Federal functions and programs that bring business information into Federal files. These include a vast variety of civil and military procurements, and various kinds of safety and economic regulation involving labor, transportation, financing, and other aspects of the economy.

Both the private interests of the business firms which submit information and the public's interest in their cooperation with Government programs call for adequate protection for sensitive business information in the Government's records.

One step would be to provide legislative assurance of timely notice to a business submitter that information he may consider confidential has been sought or may be released under FOIA. Another would be to assure the submitter a more adequate opportunity to show the agency why the information should be protected.

The third and perhaps most difficult step would be to provide substantive legislative standards that are clearer and better than some which today confuse this area, standards to determine two important questions: What kinds of business information in agency records are protectable, and what should be the limits on agency discretion to release protectable information.

On the question of what kinds of business information should be protectable, one approach might be a general standard of avoiding economic injury or risk, with various factors to consider in applying this standard, supplemented by special standards or special procedures for particular industries, particular Federal programs, or types of information that need special protection.

On the second question, agency discretion to release information from a business that will jeopardize the business should not exist unless release will advance a definite public interest in a way which outweighs the risk to the company. Even then, the submitter should be able to challenge the proposed release in court.

In approaching the whole vast area of business information, two further thoughts are worth considering. One is that some things like a government contract have a dual character. Such a contract is a business deal whose terms the company might prefer to dis-

close only in part, but such a contract is also government action. The long history of recurrent corruption, favoritism, and waste at all levels of government in the letting of government contracts argues strongly against secrecy for commercial reasons as to the terms of such contracts.

The second thought is that protection under FOIA for business information should have some reasonable relation to protection for that other great private sector interest, individual privacy. The law must be able to withstand critical comparison of the way it protects business firms and the way it protects individuals. Protection should seldom be absolute if the public has a sufficiently strong justification for disclosure.

This is the law today as to individual privacy, where any public interest in disclosure must be balanced against the injury to the individual. No one today is suggesting that this balancing requirement be changed where individuals are concerned.

PERSONAL PRIVACY INFORMATION

Four: The protectable interest in personal privacy. Just in the past year, the Court of Appeals for the District of Columbia Circuit has rendered a series of surprising decisions, cutting back seriously on personal privacy under FOIA exemption 6. These decisions run counter to the previous understanding of the law by most courts and lawyers and counter to the intention of Congress in FOIA and the Privacy Act.

These decisions are based on a new interpretation of the phrase "similar files" in FOIA exemption 6. This new interpretation is that the phrase does not include personal information about specific individuals, the release of which might harm them, unless the information is "intimate" or "highly personal."

If the information is just "personal," it is not enough to qualify it even for consideration for possible protection, even if its release could result in adverse consequences to the individual including death.

Before this new interpretation, the statutory standard under FOIA exemption 6 was whether release of particular information about an individual would be a "clearly unwarranted invasion of personal privacy." However, this key question cannot now even be considered if the information is not part of a "similar file" as now interpreted in the District of Columbia Circuit.

The practical results thus far have been to preclude consideration of possible protection under exemption 6 for personal information relating to an individual's activities in his occupation on the theory that work is not "intimate" or "highly personal," and, in addition, to deny exemption 6 protection for personal history information which might expose individuals to foreign harassment or terrorism, and to deny such protection for information that certain individuals worked in a university on CIA projects, even though the individuals did not know that the work they were doing was being done for the CIA.

Congress, in passing the Privacy Act, was fully aware of FOIA, and relied on the then interpretation of FOIA exemption 6. Congress explicitly wrote into the Privacy Act's definition of records

the concept that that act's protection should apply to "any item of information about an individual maintained by an agency, including, but not limited to, his education, financial, medical, criminal, or employment history that contains his name or other identifying particulars."

Since the practical effect of that language depends in large part on FOIA, with which the Privacy Act interrelates, the recent judicial changes in the meaning of FOIA exemption 6 also curtail the objectives sought by Congress in the Privacy Act.

The rejection of the District of Columbia Circuit's recent assault on FOIA's privacy exemption is especially important because personal privacy, although an interest of great importance with constitutional aspects, does not have effective support by strong organizations as do other major protectable interests. In addition, it is often impracticable for agencies to give notice to individuals before releasing information about them, like the notice usually given to business submitters, so that they may have an opportunity to object and to defend their interests.

FOIA TIME LIMITS

Five: FOIA procedures as to time limits. Let us be clear on what is right and what is wrong about the present time limits. These limits, as you know, are 10 working days or 2 weeks to act on FOIA requests, and 20 days or 4 weeks for appeals.

In normal circumstances, and for requests presenting no great difficulty, these are reasonable limits to protect requesters from excessive bureaucratic delays. Nevertheless, the present time limits merit legislative attention for two reasons: One, because they tend to indicate that FOIA work should always take precedence over other agency responsibilities, and, two, because they put Government agencies in an apparent position in the eyes of the public of violating the law even when large backlogs or large or difficult requests take more time.

An adequate extension of time to fit a really large and complex request cannot be granted under the present law, except by a court, and, catch 22, there is no way the agency can ask a court for such an extension unless the requester chooses to file a suit for the records.

Two changes are needed. First, there should be a more realistic list of circumstances that warrant a time extension, including, for example, the need to obtain input from a private submitter of information. Second, an agency should be able, by notice to the requester, to extend the limits to a definite date because of circumstances listed in the statute, subject of course to the requester's right to file a suit challenging the time extension as unwarranted or excessive.

FOIA FEES

Six: FOIA procedures on fees. Total fees paid by FOIA requesters cover only a tiny fraction, perhaps only 2 percent or less, of the costs to taxpayers of handling their requests. However, the matter is not that simple. Fees naturally tend to discourage requests. If higher fees are charged, some information which would benefit the

public or would benefit a private citizen at little cost would not be furnished.

The study, which we completed in 1979, contained detailed recommendations on fees to achieve three general effects, which I still favor: First, that requests which are costly to process and are made for private rather than public benefit should be charged more nearly compensatory fees to reimburse the taxpayer for a large part of the cost; second, to provide minimum fees, or none at all, where the request will benefit the public and is not costly to handle; and, third, to provide in-between treatments for both of the types of in-between situations; namely, the costly but public benefit kind of request and the inexpensive but private benefit kind.

MAKING DELETIONS UNDER FOIA

Seven: FOIA procedures as to the reasonably segregable clause. In 1974, Congress inserted at the end of FOIA subsection (b) a clause requiring that an entire record not be withheld just because a portion of it is exempt. The principle is sound, but the provision as now worded has often generated problems in practice, causing additional work and uncertainty for agency personnel.

A further result is that requesters sometimes receive useless gibberish or, more rarely but more seriously, receive sensitive information, perhaps about an informant, which slipped through without deletion.

The problem is in applying the statutory word "reasonably," and the cure is to spell out more definite standards to indicate when the segregation and release of nonexempt parts of a record is reasonable and when it is not. The study completed in August 1979 contains such standards, and I believe they would represent a worthwhile improvement in the statute.

In conclusion, I hope I have shed some light on most of the main areas for legislative concern, although there are others mentioned in my prepared statement.

Thank you.

Mr. RADER. Thank you, Mr. Saloschin. The subcommittee deeply appreciates the expertise and experience which you bring to this subject.

Senator Hatch has informed me he will return from the floor just as soon as he possibly can. In the meantime, he has requested me to ask a couple of questions.

First, in your work at the Justice Department, you had a unique opportunity to see the actual costs involved in administering the Freedom of Information Act. You have discussed in your testimony the costs to Americans in general and the costs to the Government in a cost-benefit analysis context. In your opinion, what is the actual dollar cost to the American taxpayer of administering the Freedom of Information Act?

Mr. SALOSCHIN. That is an extremely difficult and comprehensive question. If I had to give you a three-word answer, after having made vigorous efforts to determine the cost, that three word answer would be I don't know. I could also say that I do not think anybody knows.

I was instructed to try to determine this as part of the study. We began at the beginning of January in 1979 to interrogate all the agencies and give them a uniform basis for constructing estimates of their costs for the year just completed, calendar 1978.

There was a great deal of objection by some agencies to any type of estimate structure or form that might perhaps suit other agencies, and particular objections to estimate forms which sought to search out costs of the type that are more difficult to find, for example the work done on FOIA by people who work on it part-time but whose regular job is in some other part or function of the agency.

We had to get on with the job and settle for a very simplified form which resulted in estimates of approximately $48 million for the calendar year 1978. We had this reviewed by an economist in the Justice Department. Of course, after having worked with all the agencies for about 10 or 12 years and having worked in the Government a long time, I had my own degree of skepticism about what information we actually extracted through these estimates.

His opinion and mine, and I think the opinion of most people who have been deeply involved in the freedom of information field, is that the costs are considerably greater if you were to determine them by a rigorous and thorough collection of data such as you might do if you had available cost accountants and similarly qualified personnel. However, how many times greater it would be, I would rather not venture a guess today.

Mr. RADER. Thank you.

What was the figure you arrived at in that 1979 study?

Mr. SALOSCHIN. That was $48 million which we traced. In our newsletter, "FOIA Update," when we reported in a series of brief stories on the costs and benefits of FOIA, we did indicate that figure, but we also indicated that it could not be regarded as accurate or even approximately accurate.

Mr. RADER. In your statement, you focus the subcommittee's attention on exemption six, the personal privacy exemption. You have explained to us why perhaps it has not received more attention from other groups.

However, what specific recommendations might you make to correct the problems without endangering public interests with regard to the sixth exemption?

Mr. SALOSCHIN. I would not change the law at all with regard to public interest balancing where individual privacy is concerned. I think the phrase "clearly unwarranted invasion of personal privacy" in the law is sound. I think it should be the test.

First, you have to see whether the release of information about a named individual would be any kind of an invasion of privacy. If it is, you protect it only if there is no substantial public interest in disclosure, or if the public interest in disclosure is definitely less than the possible risk to the individual. That is the way it should go.

The change that I would make would be simply to restore the law to what it was understood to be before the decisions in the past year here in the D.C. Circuit, that the phrase "medical files, personnel files, and similar files," which Congress wrote way back in 1966, was simply, as most people understood it, the best way they

could express themselves at that time in giving people a feel for the kinds of records that would be more likely to contain information, the release of which would be a clearly unwarranted invasion of privacy.

Therefore, I would suggest an amendment with appropriate legislative history to eliminate the surprising and radical, gimmicky interpretation of this phrase "similar files," as I indicated in my prepared testimony. There is a more detailed analysis of this in a recent issue of FOIA Update.

Mr. RADER. One of the bills that the subcommittee is currently considering, S. 587, provides a time limit for responding to a request which is prorated to allow 60 days for every 200 pages of documents that are requested, up to a maximum of 1 year for any request. In your opinion, would this adequately address the time limit problem which your testimony discussed?

Mr. SALOSCHIN. I would think that such an approach would not adequately meet the needs of the requesting public, including the people that the act was primarily intended to benefit, the scholars, the news media, and the citizens, in their capacity as citizens. Nor would it, surprisingly enough, alleviate the situation of Federal agencies under the present time limits.

Of course some agencies would receive some benefit from that particular proposal, but the number of pages to be reviewed in many instances is not an adequate measure of the time. You may have a great deal of difficulty in searching to locate the particular records that have to be reviewed. Once you have found them, a review job may be extremely simple. It may be apparent once you have found them that all of them should be released or all of them should be withheld, and it might not take more than a few hours or a few days to do that, but it might take tremendous searches in Federal record centers or other places to find the records. That proposal would not respond to that.

In addition, sometimes the question of whether you legally can and as a matter of policy should withhold records is not proportionate in its difficulty to the number of pages. I happen to know of an instance where a 13-page record required intensive discussions by high-level and low-level legal and policy people in a whole series of Government agencies before a decision was finally made after 6 or 7 months of intensive disputes to release the record.

Let me put it this way: I think you can come up with more practical amendments in the time limit area than that particular one.

Mr. RADER. Your testimony mentioned that perhaps less than 2 percent of the actual cost of the Freedom of Information Act is collected in fees assessed against the requester. Would you recommend any changes to alter that current situation?

Mr. SALOSCHIN. As I indicated in my testimony, yes, I think that there should be some changes in fees. When a requester, let us say for the purpose of fighting a criminal tax fraud prosecution against himself, in addition to the usual methods of defense, files a freedom of information request that takes literally thousands of man hours to process and to defend the Government in court, producing, for example, as one part of that, a Vaughn index of—if I recall correctly—13,000 pages, which had to be submitted to the court merely to

list and describe the records being withheld, or, for example, when a request is filed for records of the Navy which measured from one end of one file cabinet to the end of the remaining file cabinets at 11,000 linear feet, a pile of records considerably higher than several Washington monuments, which the Navy estimated would require 100 or 200 people working full time for a year just to examine, if that kind of a request is being done as a part of dispute over payments under a contract, for example, I am not sure that the taxpayer should foot all or 98 percent of the bill.

Mr. RADER. Thank you, Mr. Saloschin. You have been an excellent first witness and have provided us with a comprehensive overview of a complex subject and some specific recommendations for legislation as well. We appreciate your efforts.

Mr. SALOSCHIN. For those who like to look at graphics instead of lengthy written records, perhaps I could leave for the record this one-page summary captioned "The Freedom of Information Act: A Major Intersection of Conflict on the Federal Legal Roadmap." It shows five main roads of access to Government-held information and five areas of protectable interests. I would leave it with you for possible inclusion in the hearing records.

Mr. RADER. Thank you. It will be included in the record.

[The prepared statement of Mr. Saloschin and additional material follows:]

Prepared Statement of Robert L. Saloschin

Mr. Chairman and Members of the Subcommittee:

Let me thank you for this opportunity to participate in your hearings on the Freedom of Information Act. I particularly appreciate it because I had mixed feelings, including a twinge of guilt, when I retired from the Justice Department at the very time when impending changes in the Freedom of Information Act would soon require the attention of the new leadership in the executive and legislative branches. Therefore, I feel that as a private citizen, I have a civic duty to help where I can, and any contribution I can offer will now be free of the constraints of Justice Department or other institutional positions. As of this date, neither I nor my law firm, Lerch, Early & Roseman of Bethesda, Maryland, represent any client for the purpose of either supporting or opposing amendments to the Freedom of Information Act.

It is hard to know where to begin in discussing a subject as large, complex and controversial as Freedom of Information. This is especially true for a witness who seeks to cover the whole subject with one comprehensive statement that will provide a maximum of perspective and usefulness.

Allow me to begin with four preliminaries: A few remarks on the importance of FOIA; on my own background for approaching FOIA questions which may be helpful in your appraisal of my testimony; then a brief attempt to identify the basic issue that underlies all the other FOIA issues which you will face; and then my own conclusion on that basic issue. The body of my statement will discuss seven major areas where legislative changes in FOIA should be considered, and finally, I will be happy to respond to questions.

Importance of FOIA

The Freedom of Information Act (FOIA) is important from several perspectives: History, comparative government, its sheer magnitude, its central objectives, and the major public and private values with which it must be reconciled.

In legal terms FOIA may be only an open records law, but it has been a bellwether for other openness changes in federal, state and private organizations. FOIA really represents a major innovation in moderm democratic government, partly comparable to free schools, expanded suffrage, the initiative and referendum, the broadcast media, or even the separation of powers. Moreover, FOIA is with us at a time of explosive growth in information-handling technology -- computers and communications -- and in the amount of information itself. In a period which some call the "Information Age", the success or even the survival of individuals and institutions may increasingly depend on obtaining (or preventing others from obtaining) access to information, much of it held by the government.

FOIA is being watched not only by states and private organizations but also by other great democracies, including Canada, Australia, Japan, and several European nations. Part of this interest has to do with FOIA's effects on trans-national movements of information in areas such as finance, trade, technology, law enforcement, and national security, and part of it is with a view to developing their own FOIA's in the light of our experience.

FOIA's sheer magnitude should not be forgotten, especially since it also embraces infinite variety. It applies to uncounted billions or trillions of records reflecting everything the government has been involved in. It includes more than a

thousand federal court decisions with judicial opinions, including a dozen in the Supreme Court.

FOIA's original and central objectives are in harmony with the success and survival of our free society: To make popular government work better, through a better informed electorate, and through better public accountability of government agencies.

The major public and private values with which FOIA must be reconciled can be identified from the statute itself and from experience under it. The Act seeks to strike a balance, which from time to time may need adjustment by Congress, between the public's right to know and the safeguarding of these major values, which I have called "protectable interests." While in legal terms FOIA has nine exemptions that permit withholding, these nine exemptions represent five great "protectable interests" -- the public's interests in national security, in law enforcement, and in government efficiency, and the private sector's interests in business confidentiality, and in individual privacy. Whenever there seem to be real conflicts between the public's right to know and any of these five major interests, there will be problems for the agencies, for the courts, for Congress and for a responsible citizenry.

Background of the Witness for FOIA questions

My background is not purely as a government lawyer. I spent over four years in the Navy; over two years in a large Wall Street law firm; I launched two businesses as sidelines years ago; I have helped create swimming pools, libraries, and zoning master plans as a civic volunteer; like millions of others, I devote some time and money to investments; and I am currently in the private practice of law.

Nevertheless, I have worked thirty-five years for the government, the last twenty-two in the Justice Department, and the last twelve of these in Freedom of Information on a full-time -- sometimes an overtime -- basis. From 1969, when I was designated the Justice Department's Freedom of Information Committee Chairman in a memorandum to all federal agencies from Assistant Attorney Generals Rehnquist and Ruckleshaus, until I retired from the Department this March, I provided informal advice on thousands of problems faced by federal agencies whose records were requested under FOIA. After 1978, as Director of the Office of Information Law and Policy, I was responsible for a stronger Freedom of Information Committee; an expanded training program for government personnel; a newsletter to keep agencies informed, known as FOIA UPDATE; an improved Freedom of Information Case List for research in the growing mass of FOIA court decisions; the issuance of position papers on major FOIA problems affecting many agencies; and last but not least, a government-wide study to develop possible FOIA amendments. These experiences have taught me many lessons, only one of which I will mention now -- that the practical results of a law depend both on how well it is written and on how well it is administered.

The Underlying Issue

You may soon become deeply involved in numerous problems and detailed proposals looking toward greater protection under FOIA for several of the five "protectable interests" which I just mentioned, and toward improving FOIA procedures for administration and litigation. Before engaging in these major labors, it might be useful to try to define the basic issue, to serve as a guide for judging the proposed changes.

I suggest that the basic issue is what changes should Congress make so that FOIA will produce the best mixture of

results that is reasonably practicable. By the best mixture, I refer to all results of FOIA that are either beneficial or detrimental to our ultimate goal of preserving and improving a free, prosperous and secure society in today's complex and turbulent world. In 1974, the focus of Congressional attention was only to maximize FOIA's benefits; today the primary concern is to minimize the detriments. Detriments include costs, whether or not they show in conventional budgeting and accounting, particularly if the costs are unnecessary, excessive or unjustified. I believe there is some room for cautious optimism, because the benefits of FOIA are not closely correlated with its detriments -- some requests produce more good results, and others more bad results.

To formulate the basic issue as I have done may sound like calling for a cost-benefit analysis; but I must caution that a truly valid cost-benefit analysis of FOIA will not be easy. Not only do we lack sufficient data, but some of the more significant costs and benefits are extremely difficult to measure with any accuracy in quantitative terms.

For example, on the benefit side, how do you measure the value to citizens and taxpayers of a law which anyone can use to expose governmental waste, fraud, abuse, favoritism, and corruption? How do you measure the value of a law under which useful information for health, safety and productivity, which the government has acquired at public expense, is available to the public? How do you measure the value of a law which gives responsible and patriotic citizens enforceable assurances that discussions and debates on public policies can be not only free but also well informed?

But on the other side, how do you measure the costs to the nation of a law with chilling effects on sources who have

important information for foreign intelligence or law enforcement or other federal functions, but hesitate to provide it because they fear possible disclosure under FOIA may seriously hurt them? How do such costs relate, for example, to the national cost of interstate theft, or to the cost of a serious international setback in economic or strategic matters? And how can you measure the costs in dollars, morale, and effects on the public of diverting agency staffs away from the work which Congress expects them to perform by making them process large and burdensome FOIA requests made for purely private purposes in order to obstruct, harass and delay legitimate agency activity which the requester or his principal opposes?

My Response to the Underlying Issue

FOIA needs substantial amendments in several areas, probably with respect to the four protectable interests and the three procedural matters discussed below. But FOIA should not be repealed or seriously crippled as an effective instrument for its original objectives. This means preserving FOIA's key fundamentals, including the following: That it applies to all records that belong to an agency and makes them available except as exempt; that requesters do not have to give reasons for asserting their rights of access; that an agency has reasonable discretion to disclose withholdable material, unless disclosure is prohibited by some other law; and that there is effective judicial review of agency withholding with the burden on the agency to justify it.

It is true that our country managed pretty well for most of its 200 years without FOIA, but the same can also be said for indoor plumbing, women's suffrage, and cars, planes and radios. We don't abandon advances because they have problems, we try to correct the problems. Perhaps we could say that FOIA

is a lusty baby that is now in real need of a bath, but let's also be careful not to throw out the baby with the bath.

The Protectable Interest in National Security Information

We are six percent of the world's population living in a world of spreading nuclear weaponry, unstable nations, unstable alliances, unstable economies, unstable leaders, and unstable national policies. To survive and prosper in such a world, it is vital that the government conduct as effectively as possible its military, diplomatic, and other international activities, including foreign intelligence.

Mr. Carlucci, when he was the Deputy Director of the CIA, testified before Congressional committees on the problems for foreign intelligence collection of the "perceptions" by potential sources of FOIA-related risks in providing our government with information. Although he indicated that the actual likelihood of such risks may be far less than feared by the potential source, the severity of possible damage to the source and his family is so drastic that the source is chilled. Considering the importance of foreign intelligence to our national survival, appropriate legislative action would seem clearly indicated.

The Protectable Interest in Law Enforcement Investigations

In addition to crime's tragic effects on its victims and those who live in fear of it, crime is a significant drain on our national economy. The efficiency of law enforcement largely depends on cooperation in investigations by sources who have useful information. However, because of fears of embarrassment, reprisals, or even loss of time, such information will often be provided to investigators only if the source is guaranteed that his identity will remain secret.

In the summer of 1979, FBI Director Webster furnished legislators with a collection of about 125 actual illustrations, with names deleted, of recent refusals to provide information for FBI investigations by various persons, including a federal judge, for fear of disclosure of the source's identify under FOIA or the Privacy Act. Similar to the situation of foreign intelligence sources, the actual risk of disclosing identities of law enforcement sources may be very small, but the perception or fear of possible disclosure may result in silence. The result is less effective investigation, meaning more crime unless the same level of enforcement can be maintained in some other way, perhaps by hiring more investigators.

Numerous concepts, proposals, and draft amendments have been devised to reduce the impact of FOIA on federal law enforcement, particularly criminal law enforcement. Some of these are better than others in offering effective protection where it is most needed, without ignoring other factors, such as the public's interest in significant investigations like those of Alger Hiss and of Julius and Ethel Rosenberg. Suffice it for today that there is a real need for careful legislative attention and appropriate action on FOIA's effects upon law enforcement.

The Protectable Interest in Business Confidentiality

There are many federal functions and programs that bring business information into federal files. These include a vast variety of civil and military procurements, and various kinds of safety and economic regulation involving labor, transportation, financing, and other aspects of the economy.

Both the private interests of the business firms which submit information and the public's interest in their cooperation with government programs call for adequate protection for

sensitive business information found in the government's records. One step would be to provide legislative assurance of timely notice to a business submitter that information he may consider confidential has been sought or may be released under FOIA. Another would be to assure the submitter a more adequate opportunity to show the agency why the information should be protected. And the third and perhaps most difficult step would be to provide substantive legislative standards that are clearer and better than some which today confuse this area, standards to determine two important questions: What kinds of business information in agency records are protectable, and what should be the limits on agency discretion to release protectable information?

It will not be easy to find good, permanent answers to these two questions, given the vast variety of facts and circumstances, and given the legitimate interests of voters and taxpayers in knowing about agency actions that involve business firms. On the question of what business information should be protectable, one approach might be a general standard of avoiding economic injury, with various factors to consider in applying it, supplemented by special standards or special procedures for particular industries, federal programs, or types of information needing special protection. On the second question, my view is that agency discretion to release information from a business that will jeopardize the business should not exist, unless release will advance a definite public interest, such as health, safety, or the integrity and efficiency of government, when and if such public interest outweighs the risk to the company. Even then, the submitter should have an opportunity to challenge the proposed release in court.

In approaching this whole vast area of business information, two further thoughts are worth bearing in mind. FOIA is

generally intended to let the citizen know what the government is doing, not what private persons are doing, but some things, like a government contract, have a dual character. Such a contract is a business deal whose terms the company might prefer to disclose only in part, but it is also government action. The long history of recurrent corruption, favoritism, and waste at all levels of government in the letting of government contracts argues strongly against secrecy, for commercial reasons, as to the terms of such contracts.

The second thought is that protection under FOIA for business information should have some reasonable relation to protection for that other great private sector interest, individual privacy. In protecting private persons from injurious disclosures, the law must be able to withstand comparison of the way it protects business firms and the way it protects individuals. Even though the practical differences are great, both types of interest need substantial protection to avoid adverse effects from government disclosures. I suggest that both should generally have protection where release would involve risks of adverse effects and when, as is common, there is no public interest in disclosure. But protection for these private interests should seldom be absolute if the public has a sufficiently strong justification for disclosure. This is the law today as to individual privacy, where any public interest in disclosure must be balanced against the injury to the individual, and no one today is suggesting the law be changed on this point. The natural question where possible disclosure of business information is concerned, is whether the law will allow a possible public interest in disclosure, however unusual or strong, to be taken into account at all.

The Protectable Interest in Personal Privacy

When I submitted our study of proposed FOIA amendments to Attorney General Bell in August 1979, there were only three broad information areas that needed legislative attention--foreign intelligence, law enforcement investigations, and business confidentiality. But during the past year, the Court of Appeals for the District of Columbia Circuit, which is the most influential circuit in interpreting FOIA, has rendered a series of surprising decisions cutting back on personal privacy under FOIA Exemption 6. These decisions seriously reduce the ability of federal agencies to protect personal information about individuals when release of the information may adversely affect the individuals and where there may be no public interest to be served by such release.

These recent decisions run counter to the previous understanding of the law by most courts and lawyers, and counter to the intent of Congress in FOIA and the Privacy Act. They are based on a new interpretation of the phrase "similar files" in FOIA Exemption 6. The new interpretation is that "similar files" does not include personal information about specific individuals, the release of which might harm them, unless the information is "intimate" or "highly personal" in character. If the information is just "personal," that is not enough to qualify it for consideration for possible protection, even if its release could result in adverse effects including death. This new interpretation of "similar files" will increase access to most federally-held information about identifiable individuals unless the information is in a "medical file," a "personnel file," or is protected by some special law like that affecting the census.

Until this new interpretation, the statutory standard under FOIA Exemption 6 was whether release of particular information about an individual would be a "clearly unwarranted invasion of personal privacy." But this key question now cannot even be considered if the information is not part of a "similar file" as now interpreted.

The practical results, thus far, have been to preclude consideration of protection under Exemption 6 for personal information relating to an individual's activities in his occupation on the theory that work is not "intimate" or "highly personal"; to deny Exemption 6 protection for personal history information which might expose individuals to foreign harassment or terrorism; and to deny such protection for information that certain individuals worked in a university on CIA projects, even though the individuals did not know that the work was being done for the CIA.

Congress, in passing the Privacy Act, was fully aware of FOIA, and Congress gave little weight to whether personal information was in a file on one general subject or in another. Congress relied on the then interpretation of FOIA Exemption 6. That Exemption, for example, protected mailing lists with home addresses except to the extent the public interest might call for disclosure. And Congress explicitly wrote into the Privacy Act's definition of records the concept that the Act's protection should apply to ". . . <u>any item . . . of information about an individual</u> . . . maintained by an agency, including, <u>but not limited to</u>, his education, financial . . . medical . . . criminal or employment history that contains his name . . . or other identifying particular . . ." (emphasis supplied). Since the practical effect of that language depends in large part on FOIA, with which the Privacy Act interrelates, the recent judi-

cial changes in the meaning of FOIA Exemption 6 also curtail the objectives sought by Congress in the Privacy Act.

A careful analysis of these recent decisions appears in the Winter 1981 issue of the Justice Department newsletter, "FOIA UPDATE," beginning at page 3. In a later D. C. Circuit decision in the same vein on February 24, 1981, (Washington Post Company v. Department of State, D. C. Circuit, Nos. 80-1509, 80-1606), there was an incisive concurring opinion by Circuit Judge Lombard, from the Second Circuit, who was sitting in D. C. by designation. In it he concluded, "I recognize, however, that Simpson states the law of this Circuit on the issue. Because of this, and only because of this, I now concur."

I earnestly hope that other judicial circuits and Congress will quickly reject the D. C. Circuit's recent assault on FOIA's privacy exemption. This is especially important because personal privacy, although an interest of great importance with constitutional aspects, does not have effective support by strong organizations as do other major protectable interests. And in addition, it is often impracticable to give notice to individuals before releasing information about them, like the notice given to business submitters, so that they may have an opportunity to object and defend their interests.

FOIA Procedures: Time Limits

Let us be clear on what is right and what is wrong about the present FOIA time limits. These limits are ten working days, which is two weeks, to act on FOIA requests, and twenty days, or four weeks, for appeals.

In normal circumstances, and for requests presenting no great difficulty, these are reasonable limits to protect requesters from excessive bureaucratic delays. In other

situations, such as the thousands of requests that have caused backlogs at the FBI, the Open America decision (Open America v. Watergate Special Prosecution Forces, 547 F. 2d 605 (D. C. Cir. 1976)), or various practical accomodations, usually give agencies the time needed to get the work done.

Nevertheless, the present time limits merit legislative attention for two reasons: because they tend to indicate that FOIA work should always take precedence over other agency responsibilities, and because they put government agencies in an apparent position in the eyes of the public of violating the law even when large backlogs or a large or difficult request prevents adherence to the statutory limits. While an agency can give itself brief time extensions, of up to ten more working days, in three types of "unusual circumstances," this provision has little practical use. An adequate extension of time to fit a really large request cannot be granted under the present law except by a court, and -- Catch 22 -- there is no way the agency can ask a court for an extension unless the requester chooses to file a suit for the records.

Two changes are, therefore, needed. First, there should be a more realistic list of circumstances that may warrant a time extension, including for example, the need to obtain input from a private submitter of business information. Second, an agency should be able by notice to the requester to extend the limits to a specified date which it finds necessary because of circumstances listed in the statute, giving its reason for the extension, and subject, of course, to the requester's right to file suit challenging the extension as unwarranted or excessive.

FOIA Procedures: Fees

Total fees paid by FOIA requesters cover only a tiny fraction, perhaps two percent or less, of the costs to the government and the taxpayers of handling their requests. But the matter is not that simple. Fees naturally tend to discourage requests, and if fees or higher fees are charged, some information which would benefit the public, or benefit a private citizen at little cost, would not be furnished.

The background for considering changes in this complex subject of fees includes the objectives and benefits of FOIA, which are hard to quantify; the costs of administering FOIA, which are difficult but not impossible to trace; the methods by which the work is actually done; the specific problems of fee administration; and an analysis of FOIA requests according to two key factors: whether they are more costly or less costly to handle, and whether they are made for and result in public as compared to private benefit.

The study which my office completed in 1979 contained detailed recommendations on fees. I still support the general thrust of those recommendations. They included amendments generally designed to produce three effects: that requests which are costly to process and are made for private rather than public benefit will be charged more nearly compensatory fees to reimburse the taxpayer for a large part of the costs; second, to provide minimum fees or none at all where the request will benefit the public and is not costly to handle; and third, to provide inbetween treatments for both of the inbetween situations, namely, the costly-but-public-benefit kind of request and the inexpensive-but-private benefit kind.

FOIA Procedures: The "reasonably segregable" clause.

In 1974, Congress inserted at the end of FOIA subsection (b) a clause requiring that an entire record not be withheld just because a portion of it is exempt. The principle is sound, but the provision as now worded has often generated problems in practice, causing additional work and uncertainty for agency personnel. A further result is that requesters sometimes receive useless gibberish, or more rarely but more seriously, receive sensitive information, perhaps about an informant, which slipped through without deletion.

The problem is in applying the statutory word "reasonably," and the cure is to spell out more definite standards to indicate when the segregation and release of non-exempt parts of a record is reasonable and when it is not. The study completed in August 1979 contained such standards, and I believe they would represent a worthwhile improvement in the statute.

Conclusion:

The foregoing statement hopefully refers to most of the main areas for legislative concern. But there are other significant problems which I have not mentioned, such as the protection of how-to-catch-crooks manuals under FOIA Exemption 2, and the widespread use of FOIA for pre-trial discovery. I also believe it would be desirable to consider what Congress might could do to encourage better administration of FOIA, but that is more than I can cover in today's statement.

THE FREEDOM OF INFORMATION ACT (FOIA)
A MAJOR INTERSECTION OF CONFLICT
ON THE FEDERAL LEGAL ROADMAP

ACCESS ROADS
PROTECTED ROADS
CITIZENS/TAXPAYERS/VOTERS RIGHT TO KNOW
NEWS MEDIA AND SCHOLARS INTERESTS IN FINDING OUT
NONPROFIT GROUPS SEEKING CONSUMER, ENVIRONMENTAL, OR CIVIL RIGHTS INFORMATION
LAWYERS PURSUING DISCOVERY FOR CLIENTS
BUSINESS REQUESTERS SEEKING COMPETITIVE INFORMATION
NATIONAL SECURITY (Defense and Foreign Relations - Exemptions 1 and 3)
LAW ENFORCEMENT (Investigatory Records and Manuals - Exemptions 7 and 2)
GOVERNMENT EFFICIENCY (Candid Advice and Internal Matters - Exemptions 5 and 2)
INDIVIDUAL PRIVACY (Exemptions 6, 7(C), and 3)
BUSINESS CONFIDENTIALITY (Exemptions 4, 8, 9, and 3)
FOIA
(Requests, Administrative Appeals, Lawsuits, Reverse Lawsuits, Amendments)
NOTE:
This diagram is not intended to depict accurately the legal requirements of FOIA (5 U.S.C. 552), which are complex.

SIX POINTS THAT EVERY BUSINESSMAN AND CORPORATE EXECUTIVE SHOULD KNOW ABOUT THE FREEDOM OF INFORMATION ACT (FOIA)

By

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U.S. Department of Justice

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SIX POINTS THAT EVERY BUSINESSMAN AND CORPORATE EXECUTIVE SHOULD KNOW ABOUT THE FREEDOM OF INFORMATION ACT (FOIA)

I. What is FOIA?

FOIA is an "open-records" law, and is the chief federal law on access to government-held information. (Other federal "openness in government" laws are the Sunshine Act, which gives the public the right to attend most meetings of multi-member agencies; the Privacy Act, which gives individuals access to many records about themselves; and the Federal Advisory Committee Act, which opens most meetings of these committees. Each of these openness laws has a list of exceptions similar to those in FOIA.)

Passed in 1966 and strengthened in 1974, FOIA provides that "any person" is entitled to access to all "agency records" -- generally, any record, including those in computers, in the possession of any federal agency -- except to the extent that the record, or part of it, is "exempt." FOIA is thus of very broad scope, has generated numerous disputes which have produced over 1,000 court decisions, and has resulted in a much more open government.

II. What is "exempt" under FOIA?

There are 9 exemptions in the FOIA covering roughly the following matters:

1. properly "classified" defense and foreign relations information;

2. very limited kinds of purely internal matters;

3. matter exempted by various other statutes;

4. trade secrets and certain other commercial or financial information obtained by an agency from a business firm, chiefly that likely to cause competitive injury if released;

5. certain internal governmental communications, chiefly memoranda prepared to help in decision-making;

6. information the disclosure of which would be a "clearly unwarranted invasion" of individual privacy;

7. investigatory law enforcement records but only if one of six specified types of harm would result from release;

8. bank examiner's records;

9. oil well and similar information.

Although records under any of these exemptions may contain information about business firms, sensitive business information is usually considered for protection under Exemption 4, and sometimes under Exemption 3, 8, and 9. FOIA exemptions are merely options to withhold, and agencies can make discretionary releases of exempt matter, except where some other law prohibits release, for example, that protecting income tax returns. If only part of a requested record is exempt and that part can be deleted, the rest of the record must be furnished.

Discretionary releases of business information which an agency recognizes to be clearly covered by Exemption 4 are quite rare.

III. What procedures must a requester follow?

Every agency is required to publish regulations telling the public how to address written requests, what fees for searching and copying may be charged, etc. (These fees and the official procedures are sometimes waived for reasons of public interest, simplicity, or speed; thus, records sometimes are sent in response to phone requests.) The requester does not have to explain why he wants access, although this may be helpful if the records are "exempt" and he seeks a discretionary release, but his request should "reasonably describe" the records he wants, to enable the agency to decide where to search for them. There is no definite limit on the number of records that may be requested.

IV. What procedures must the agency follow?

The agency must send the requester a determination to grant or deny access within 10 working days after the request is received at the proper office. A reason (an exemption) must be given for any denial, and the requester must be informed of his rights to an appeal to a higher official in the agency, and to judicial review in case anything is denied on the appeal. Appeals must be acted on within 20 working days. Time extensions up to another 10 days are possible in defined special circumstances, and the requester can sue if the time limits are violated, but the court can grant an agency more time upon proof of "exceptional circumstances" and "due diligence."

V. What will happen if the requester goes to court to upset an agency denial of access?

The case is supposed to get expedited consideration. The agency has the burden of proving that the withheld records, or the deleted parts of them, are exempt. If the suit is for records containing business information, the business firm which submitted the information may wish to assist the agency in

proving the records are exempt, or may wish to intervene in the suit. The court may inspect the withheld material "in camera" (in chambers). The court may award the plaintiff attorney's fees, and may order the Merit Systems Protection Board to investigate and require the punishment of agency officials responsible for an "arbitrary and capricious" withholding, but such disciplinary proceedings are very rare.

IV. What will happen if the agency is hesitant or unwilling to protect business information which it obtained from a business firm that wants the information withheld?

If the agency thinks that the business firm might object to the agency's granting a FOIA request for access to the information, but the agency thinks it may grant the request anyway, the agency usually will contact the firm to see if it objects, and if so may solicit facts that the agency needs to help show why the information is competitively sensitive and legally withholdable.

If the agency finally determines to release the information over the business firm's objections, the actual transmission of the records to the requester will usually be delayed for 5 or 10 days after the agency has notified both the requester and the business firm of its determination to release.

This delay gives the business firm a chance to file a "reverse FOIA" suit in federal court to restrain and then prohibit the disclosure. When such suits are filed, the government almost always consents to a temporary restraining order, giving both sides time to prepare their cases on the merits. The business firm can usually expect to win if it can show either that the information is covered by the Trade Secrets Act, whose meaning is in great dispute, or by Exemption 4 of FOIA unless the agency can justify a discretionary FOIA release. Sometimes, the business firm can delay release by a "reverse" suit until the information is no longer sensitive.

The current law governing the rights of business firms to block agency releases of their business information is subject to many uncertainties; the federal courts have divided on some of the legal issues, and the Supreme Court has expressly left some legal issues undecided, but Congress may well change this situation.

(For additional copies of this article and current information, contact the author at Lerch, Early & Roseman, Chartered, 7101 Wisconsin Avenue, Suite 1313, Bethesda, Maryland 20814-4892, (301) 986-1300.)

Mr. RADER. With Senator Hatch due to return soon from the floor of the Senate where he has other important business, we would like to call our next witness, William Taft, General Counsel for the Department of Defense.

Mr. Taft has worked in the Government for 7 years in addition to 4 years in private practice. He has served as General Counsel for the Department of Health, Education, and Welfare, as Principal Assistant to the Director of the Office of Management and Budget, and as Executive Assistant to the Secretary of Health, Education, and Welfare.

Inasmuch as the Department of Defense has a reputation as one of the most efficient administrators of FOIA, we appreciate your participation today, Mr. Taft.

STATEMENT OF WILLIAM TAFT, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. TAFT. Thank you.

I appreciate this opportunity to appear before you today and to present the Department of Defense's views concerning our experience with the Freedom of Information Act, to which I will also refer as FOIA from time to time.

At the outset of my statement, I think it is important to stress that the Department of Defense is strongly committed to the effective implementation of the act. Our record demonstrates our commitment to honor all requests for information by members of the public consistent with the national security and the protection of Government interests defined in the various exemptions to the act.

The Department of Defense has given a high priority to development of an internal system for complying with a large volume of FOIA requests within the permitted time limits for response. The DOD handles all but a small percentage of the FOIA requests it receives annually within the statutory time period.

Further, this processing of requests has been accomplished without disclosing classified national security information, which is of course contained within many of the requested documents but excised pursuant to an exemption of the act.

It has been our experience that the principal burden of the act is the cost imposed on the taxpayer in order to comply with the act and protect our national security interests. This cost is imposed in terms of actual expenditures and diversion of manpower resources not directly dedicated to administration of the act.

While of course we do not expect that the many substantial benefits of the act can be realized without incurring some costs, we believe that the act, in certain aspects, unnecessarily detracts from the efficiency of the DOD's decisionmaking and poses small but avoidable risks to national security.

Accordingly, I am here today to describe for you the magnitude of such costs and to discuss other problems that the DOD has encountered in complying with the act.

COMPLIANCE COSTS

In calendar year 1980, 57,053 public requests were received under the FOIA by the Department. This caseload represents a 15-percent

increase over the number of requests received in 1975 when the 1974 amendments to the act first became effective, but it represents a 5.5-percent increase over the number of requests received in 1979.

Our experience, however, indicates that the number of documented requests is somewhat misleading in that, since 1975, the press and research and scientific journal authors and others have largely abandoned the use of the FOIA since they are encouraged to elicit information through informal channels and have found those channels to be satisfactory without resorting to use of the formal request. Only 2,829 of the 57,000 requests submitted in 1980 were denied, either in whole or in part, and those denials were of course based on the FOIA statutory exemptions.

In calendar year 1980, the documented cost of handling these requests was $6.8 million in DOD. In 1979, the documented cost was $6 million. The 1980 expenditure represents almost a 45-percent increase from the $4.7 million expended in calendar year 1976 for the same purpose. This 45-percent increase, of course, does not include the cost of processing informal requests, which as I have just noted, have increased in addition to the formal requests.

The largest single component of the documented expenditures is the manpower cost, including time spent in searching, review and deletion, coordination, approval, and correspondence concerning the items requested. Our experience indicates that in addition to passing through the freedom of information offices, a typical FOIA request will be reviewed by at least one middle-management level official having substantive expertise, and often will also require consultation with the Office of General Counsel. In some instances I have been familiar with, it has required consultation with more than one or two members of that office.

Senator HATCH. May I interrupt you for one second?

Mr. TAFT. Sure.

Senator HATCH. When you indicate the manpower costs, would they be in addition to the $6.8 million?

Mr. TAFT. What we have calculated, Mr. Chairman, are the direct costs of manpower dedicated to the FOIA requests and to the handling of them. The $6.8 includes those manpower costs and also copying costs that they incur and so forth.

Senator HATCH. Those who are actually assigned to find the documents, go through them, et cetera?

Mr. TAFT. That is correct. That is a considerable number of people in our case.

In processing FOIA requests, the act provides only standard document search and duplication fees may be charged the requester. In 1980, the DOD collected fees in the sum of almost $250,000. This figure approximates the annual average of DOD receipts since 1975.

By contrast, the actual cost to the DOD in 1980 for direct search and copying was approximately $800,000. The remaining $550,000 was waived because the release of the requested information was judged to be in the public interest.

FOIA "USER" PROBLEMS

Given the costs imposed by the FOIA and the minimal recoupment available, it is important to examine who is receiving the benefits of the act. As the act authorizes "any person" to seek access to agency records, any United States or foreign citizen, corporation, and so forth, is entitled to use the FOIA.

Since 1975, only 20 percent, or one out of five of all FOIA requests received by the Office of the Secretary of Defense (OSD) were received from private individuals; 14 percent of the requests were received from special interest lobbying groups. By contrast, 55 percent of the requests received by OSD in that 5-year period have come from business firms, especially law firms, typically representing commercial enterprises.

These statistics illustrate what may be described as a "user" problem with the act. Significant costs to the taxpayer are being imposed by those who, in our judgment, were not intended to be financial beneficiaries of the act. Several categories of such users may be readily identified.

First, as indicated above, law firms representing commercial enterprises use FOIA rather than discovery or to supplement discovery in connection with litigation either to decrease fees incurred in the litigation process or to obtain records not available through that process.

For example, a large District of Columbia law firm submitted a request for essentially all documents which had been generated with the Trident submarine contract. It was estimated that compliance with this request would have required searching 12,000 linear feet of files—that is approximately 24 million pages—just to locate the requested documents.

Senator HATCH. Just a simple little request.

Mr. TAFT. The request was very short.

Senator HATCH. The request was very short, but the linear feet were very long.

Mr. TAFT. The effort to locate and review specific requested documents for releasability was estimated to involve a minimum of 350,000 man-hours. Obviously, compliance with a request of this nature would have a serious adverse impact upon our ability to perform the functions for which we are responsible.

A second problem with the use of the act is that the DOD is required to expend substantial public resources in responding to requests for voluminous records from persons who are not citizens of the United States at all. There have been cases in which foreign nationals have requested and received sensitive information that although not classified, does relate to national security matters.

Foreign businesses have also used the act to obtain commercial information such as industrial designs submitted by American firms during the contract award process.

In still other cases, citizens of foreign governments have used the act to gain access to DOD documents for the purpose of opposing the plans of their own governments for cooperative security arrangements with the United States. These are documents that they could not have obtained from their own governments.

A related problem arises since the term "records" is left undefined by the act. As a result, we receive requests for information that surely were never intended to be made available to the public. One category of these requests is for computer programs, maps, and charts developed at Government expense, which are of considerable commercial value. Under prevailing interpretations of the act, the Department may be required to make such items available to a few requesters who, thereby, realize a windfall from research and other scholarly activity funded out of tax dollars.

Similarly, the DOD receives requests for personnel lists or rostors which are capable of being produced through DOD computers. These lists are utilized in connection with commercial solicitations by private firms and often result in unwarrented intrusions upon the privacy of our employees and retired personnels.

This use of military computer capability for these purposes is, in our judgment, simply incompatible with the military mission. We have also experienced problems with repeated requests for the same information from the same parties. Under the act, with each request, we must provide the requester with the entire volume of the material, not just updated information.

I would like now briefly to review some specific concerns we have had in DOD with the implementation of the act. These concerns are among those being considered by the administration in preparing legislation to amend the act. The administration, as you know, is preparing to submit legislation, but we have not yet concluded our review. We will work with the committee and these are some of the areas we are looking at.

ADVERSE IMPACT ON AGENCY DECISIONMAKING

Perhaps no more onerous provision of the act exists for us than the administration of the B(5) exemption which covers those records which are "interagency or intraagency memorandums or letters which would not be available by law to a party other than agency in litigation with the agency."

The necessity of determining whether the interagency memorandum or letter would be available to another party in the discovery proceeding has been interpreted by the courts to require the agency to review on a line-by-line basis staff papers and other advisory records.

This line-by-line analysis is necessary in order to make available to the requester factual information that is severable from privileged advisory portions of the record and not otherwise exempt from disclosure. Since such factual information would be available in a litigation proceeding it is required to be released under the act.

This application of the so-called "reasonable segregation" requirement obliges the agency to engage in the frequently difficult task of distinguishing between facts and evaluations and of determining whether the selection of facts in an advisory memorandum is not itself the product of an evaluative determination which requires protection from public disclosure if the decisionmaker is to receive the type of candid advice essential to the sound management of the agency.

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In addition, there is concern over determining in advance which portions of staff papers may or may not be protected from public disclosure. This concern threatens to influence officials, in some circumstances, to base decisions on oral discussions, thereby avoiding the creation or preservation of records subject to the act. The absence of such records may adversely affect the quality of decisionmaking and deprive those charged with implementing these decisions of valuable information about the nature of the decision and the manner in which it should be executed.

Mr. Chairman, this is a matter in which I have had frequent experience over the past several months. Many committees and other officials within the DOD have come to me before entering into a decisionmaking process to request in advance advice as to what, if they put information on paper, would be available under the Freedom of Information Act. My office must frequently give opinions to DOD policymakers regarding our ability to defend records which these officials clearly wish to make for their own convenience.

The legislative history of the act has been interpreted to exclude records of the President and his close advisers. That interpretation, however, has not been extended to those personal advisers who are high-ranking Cabinet officials or others acting on their behalf when such officials are advising the President. This creates another burden on effective decisionmaking. Advice rendered to the President by a Cabinet official is as important, we believe, and therefore as deserving of protection under the act as advice a President receives from his personal advisers.

COMPILATION AND INDEXING REQUIREMENTS

Federal district court opinions require that agencies comply with the mandate of the act that final opinions and orders made in the adjudication of cases be made available to the public even in cases where such opinions and orders are never relied on, used, or cited by an agency's administrative tribunal in subsequent determinations.

As a result, the Department of Defense has, for example, been obliged, after a court order to this effect, to compile and index determinations regarding the grievances of military personnel filed under article 138 of the Uniform Code of Military Justice. This requirement applies despite the absence of any adjudicative forum for the evaluation of these grievances and the practice of evaluating each case on its own facts without regard to earlier grievance decisions under article 138.

The need to create and maintain extensive records of actions that have no precedential value and to segregate, prior to release, portions of such records pertaining to matters within an individual's scope of personal privacy, which frequently appear within such records, is extremely burdensome to the DOD.

Incidentally, I have been advised that since the order of the court was issued some years ago requiring us to compile this index on our article 138 proceedings, we have received one request for information connected with those cases.

DETRIMENTAL EFFECT ON INTELLIGENCE

Available evidence also indicates that the act is having a detrimental effect on our security relationships with other countries. Some foreign governments and confidential sources of information are beginning to limit or end cooperation with the United States in sensitive matters of national security in response to recent interpretations of the act. Again, this was mentioned by an earlier witness and has also been testified to in the previous Congress by Deputy Secretary Carlucci from his experience at the Central Intelligence Agency.

Federal district court judges are obliged to fulfill the requirement for de novo review of records denied because of a security classification by reviewing the basis for the agency's classification determination. Even though the courts do give substantial weight to agency affidavits certifying the validity of the agency's classification, in some cases the courts have insisted on supplementary classified affidavits submitted in camera for ex parte consideration by the judge, and in a few cases, in camera review of the classified records in question before determining the applicability of the alleged exemption.

Concern over protecting the classified affidavit and the unpredictable exposure of sensitive records to the court have alarmed some foreign governments and some confidential sources of information. This concern has led to the consideration of legislative proposals by the Congress that would exclude Government organizations involved in intelligence gathering from the definition of the term agency under the act. We are, of course, considering that specific proposal within the administration as well.

An inhibitive effect on the receipt of necessary information by the DOD may occur in the commercial context in addition to the intelligence area. The DOD receives many records containing business information submitted by private parties in connection with the award and performance of contracts or other official functions.

Upon receipt of a request for information submitted by a private party, the DOD routinely notifies the submitter of the information in order that they may lend guidance to whether the requested record is a trade secret or commercial or financial information that is privileged under the act.

However, I think it is fair to say that there is a certain inequity that results from reliance on this procedure. Large contractors and other well-financed private organizations have adequate resources for providing timely assistance and thereby protecting their interest in the information.

However, smaller contractors and other private parties may find that the financial burden of providing timely assistance directly or through private counsel to be excessive. Consequently, they may be unable to provide the type and degree of assistance which would make the difference in the agency's determination or in the determination by a court, should that develop, whether a requested record qualifies for the b(4) exemption.

DISCLOSURE OF CRITICAL TECHNOLOGY

Another problem caused by the FOIA is that the DOD must make available to any person records which the Arms Export Control Act and the Export Administration Act otherwise might protect against export.

The Arms Export Control Act requires that a license be obtained from the State Department before data containing critical technology may be exported from the country. The Export Administration Act imposes a similar requirement for authorization from the Commerce Department for exportation of other kinds of technical commercial data. It is not certain, however, that either of these statutes constitutes a basis for withholding records containing the same data from a requester under the act.

The foregoing effects of the act result in significant costs for the DOD in the processing of requests under the act for documents requiring review, evaluation, and duplication.

To assure the continued effectiveness of the act to achieve those purposes intended by the Congress, we believe that these matters need to be addressed by legislative changes. The administration is developing specific proposals for consideration by the Congress on these points. We look forward to working with your committee as it reviews them. We welcome these hearings and the opportunity to present our views to you, sir.

Senator HATCH. Thank you, Mr. Taft.

In implementing the Freedom of Information Act, are there conflicts with other statutes which affect the Department of Defense?

Mr. TAFT. Yes, there are of course.

Senator HATCH. You have indicated some in your remarks here today.

Mr. TAFT. Yes. The last conflict that I mentioned in the statement was with the Arms Export Control Act. While we do not have the direct administration of that act, we are heavily involved in determinations made under its provisions. Of course, the Privacy Act contains factors which we have to weigh when Freedom of Information Act requests come before us. Other agencies have a similar obligation.

There are other statutes which come into play as well, particularly the classification authority which we have and also our responsibility to protect intelligence sources and methods under the National Security Act.

Senator HATCH. Would you make up a list of all statutes which may conflict with FOIA and get those to us?

Mr. TAFT. Yes, we would be glad to do that.

[Material to be supplied follows:]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301

August 7, 1981

Honorable Orrin G. Hatch
Chairman, Subcommittee
on the Constitution
U.S. Senate
Washington, D. C. 20515

Dear Mr. Chairman:

During my recent testimony before the Subcommittee on the Constitution of the Senate Judiciary Committee I testified that the Freedom of Information Act ("FOIA") occasionally comes into conflict with other statutory provisions affecting the Department. You requested that I forward to the Subcommittee a comprehensive list of statutes which pose this type of conflict to DOD in administering the FOIA.

Our investigation has revealed that the statutes enumerated below frequently have objectives that could be frustrated by the release of information requested under the FOIA. In responding to FOIA requests, the Department must consider the requirements of the statutes as well as the FOIA itself.

1. 22 U.S.C. §2778 - The Arms Export Control Act.

2. 50 U.S.C. App. §2406 - The Export Administration Act.

3. 17 U.S.C. App. §101-810 - The Copyright Act.

4. 5 U.S.C. §552a - The Privacy Act.

5. 18 U.S.C. §1905 - Criminal Code Provision Protecting Trade Secrets and Other Private Commercial Information.

6. 35 U.S.C. §186 - The Patent Secrecy Act.

7. 18 U.S.C. §798 - Criminal Code Protection of Cryptographic and Communications Intelligence Records.

8. 18 U.S.C. §952 - Criminal Code Provision Protecting Diplomatic Codes and Correspondence.

9. 18 U.S.C. §2511 - Criminal Code Provision Protecting Against Disclosure of Illegally Intercepted Wire or Oral Communications.

10. 42 U.S.C. §2162 - Restricted and Formerly Restricted Data Under the Atomic Energy Act.

11. Act of May 29, 1959, Pub. L. No. 86-36, §6, 73 Stat. 63 (codified at 50 U.S.C. §402 note) - National Security Agency Information.

12. 50 U.S.C. §403(d)(3), §403g - Intelligence Sources and Methods.

13. 42 U.S.C. §4582 - Patient Confidentiality Provision Regarding Alcohol Abuse Prevention, Treatment & Rehabilitation.

14. 21 U.S.C. §1175 - Patient Confidentiality Provision Regarding Treatment of Drug Abuse.

15. 15 U.S.C. §3705(e)(1)(E) - Technology Innovation Information.

Recent court decisions raise particular concerns with respect to the first five statutes enumerated. We believe that the Committee should consider clarifying the scope of the exemption from disclosure provided in 5 U.S.C. §552(b)(3) to insure it includes all information for which the Government seeks to restrict dissemination pursuant to these statutes. Further, the Committee may wish to consider practical problems resulting from the dissemination standards set forth in the Copyright Act and the Trade Secrets Act. The rationale underlying our concern regarding the (b)(3) exemption as it applies to each of these five statutes is set forth below.

General Background on Exemption 3 of the FOIA.

The FOIA does not require the release of:

> matters that are . . . (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. §552(b)(3). (the "(b)(3) exemption")

Whether an Act of Congress qualifies for (b)(3) exemption purposes turns on the language and legislative history of the enactment itself. American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978), typifies the care with which the courts evaluate legislation before according it exemption 3 coverage. At the outset, the court observed that each subsection of the (b)(3) exemption erects different hurdles to invoking the exemption. In order to qualify for exemption under subsection (A), the legislation may not "tolerate any decision-making on the administrative level." Id., at 628. Rather, a (b)(3) statute must require the complete protection of the data it describes. Generally, a provision that confers any discretion on an administrator to release information lies outside the scope of subsection (A). Id.

A different standard, however, applies with respect to subsection (B). It affords an administrator some latitude in applying a (b)(3) statute, providing that the statute either plainly establishes rigorous criteria for exercising that discretion or identifies explicit categories of information that must be withheld. Id. The court in Kreps, however, sharply restricted an administrator's discretion.

> "Nondisclosure is countenanced by subsection (B), if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." 574 F.2d at 628-29.

In construing exemption (b)(3)(B), courts have sustained nondisclosure of records only when the alleged withholding statute erects distinct guideposts to guide the agency's discretion in denying the release of documents. "The basic policy choice [must be] made by Congress, not entrusted to the admini-

strative discretion in the first instance." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 828 (D.C. Cir. 1979). Application of this test, however, has proven to be quite harsh on Government agencies seeking to withhold information. As a result, it may be possible to obtain information that is at least apparently intended to be protected from release under the following statutes through a FOIA request.

1. The Arms Export Control Act, 22 U.S.C. §2751, etc. (1976 and Supp. III 1979). Section 2778 of the above-referenced statute empowers the President to regulate the import and export of "defense articles and defense services" across the national borders of the United States. The section provides in pertinent part:

> (a)(1) In furtherance of world peace and security and the foreign policy of the United States, the President is authorized to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the import and export of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List. 22 U.S.C. §2778 (emphasis added).

In order for §2778 to qualify for a (b)(3) exemption, two preliminary assumptions are required. First, "defense articles and defense services" must include technical information as well as hardware. This interpretation should pose little problem, since the President has the authority to prescribe what commercial exports are covered by the phrase. 22 U.S.C. §§2778, 2794(7). Moreover, as for items exported by the Government, "defense services" includes "defense information," 22 U.S.C. §2794(4), which, with several exceptions, consists of "any documents, writing, sketch, photograph, plan, model, specification, design, prototype, or other recorded oral information relating to any defense article or defense service . . . ." 22 U.S.C. §2403(e).

The second necessary assumption, in order to conclude that §2778 is a (b)(3) statute, is that Congress must have intended to prevent the disclosure within the United States of information categorized as "defense articles and defense services," not merely to forbid its export. Since this section appears to be aimed solely at the transfer of defense items, including data, to foreign countries, however, any legislative history in support of preventing domestic disclosure must be provided by inference.

Arguably, the requisite legislative intent may be inferred from the statutory scheme of the entire Arms Export Control Act, which depends upon the preservation of domestic secrecy for the restraint of some exports. A variation of this theory met with favor in Irons and Sears v. Dann, 606 F.2d 1215 (D.C. Cir. 1979). That decision held that "the mere presence of some residual administrative discretion" did not preclude invoking subsection (B) of the (b)(3) exemption, although such discretion could not satisfy the requirements of subsection (A). Id., at 1220. Sole reliance on this authority in order to qualify for the (b)(3) exemption is ill-advised, however, because its conclusion was sharply limited for purposes of precedential value and is contrary to a number of other authorities which have addressed the matter.

It is important to note at the outset that the Kreps decision, among others, holds that any discretion accorded the

President to withhold data under a statute is sufficient to exclude that statute from a (b)(3)(A) exemption. Section 2778, standing alone, empowers the President to block the dissemination of technological information, but does not, in absolute terms, require him to do so. Thus, there is an element of discretion accorded the President.

There is also doubt whether §2778 standing alone will qualify under subsection (B). This section permits the President to determine those "defense articles" and "services" whose export is to be controlled, rather than itself "referring to particular types of matter to be withheld." 5 U.S.C. §552(b)(3)(B). Nor does §2778 "establish particular criteria for withholding" information. Id. Admittedly, subsection (a)(2) of §2778 does require the President to consider several factors, gleaned from the advice of the Director of the Arms Control and Disarmament Agency, in regulating exports. Yet these factors are arguably almost as vague as language which was held inadequate in Public Citizen Health Research Group v. HEW, 477 F.2d 595, 600 (D.C. Cir. 1979). Moreover, even if §2778 does specify adequate criteria, the President still has complete discretion as to how - and whether - those criteria are applied. That amount of administrative latitude was denounced in the Kreps case.

More detailed criteria for protecting technical information from disclosure are set forth at 22 U.S.C. §§2751, 2753, 2754, 2755, 2773, and 2776 (1976 and Supp. III 1979). Even assuming the Arms Export Control Act, taken as a whole, forms sufficient criteria for purposes of (b)(3)(B), the President would still have discretion in whether to control the flow of technical information at all.

The foregoing discussion is sufficient to indicate that neither the Arms Export Control Act taken in its entirety, nor §2778 thereof, standing alone, limits discretion in a manner that unambiguously brings it within the (b)(3) exemption. The ludicrous result may be, therefore, that the Department of Defense must, under the FOIA, make available to "any person" records which the Arms Export Control Act protects against export. This result is incompatible with the effort to scrutinize more carefully the exploitation of critical technology by those who may employ it for purposes inimical to the interests of the United States. The agencies charged with the responsibility for determining the circumstances under which critical technology may be exported should similarly be authorized to prevent the circumvention of those protective procedures through the Freedom of Information Act.

2. The Export Administration Act of 1979, 50 U.S.C. App. §2404(d), (1980 Supp.). The above-referenced provision requires the Secretary of Defense to prepare and publish a Militarily Critical Technologies List ("MCTL"). Items on the MCTL are subject to export controls. 50 U.S.C. App. §2404(a). In preparing the MCTL, the Secretary must accord "primary emphasis" to those factors listed at 50 U.S.C. App. §2404(d). Pursuant to the authorities discussed in the foregoing section, §2404(d) may not qualify as an exemption (b)(3) statute. First, the statute itself does not specifically exempt the information from disclosure. Further, the criteria set forth therein for determining whether a particular matter may be subject to export restriction are not exclusive (i.e., only "primary emphasis" must be given those factors) and the Secretary has complete discretion in determining which items shall be placed on the MCTL. As a result, there is at least a question whether data protected pursuant to this statute may be withheld under FOIA from a requester on grounds the statute qualifies for a (b)(3) exemption.

3. The Copyright Act of 1976, 17 U.S.C. App. §§101-810 (1976). The above-referenced statute amended the federal copyright laws. Generally, it provides that the owner of copyright material has the "exclusive" right to reproduce that work. 17 U.S.C. App. §106(1). This right, however, is subject to certain statutory limitations of the previous law, which are set forth at §§108-117. In addition, §107 grants statutory recognition for the first time to the equitable doctrine of "fair use," thereby, further limiting the right of the owner of copyrighted material to prohibit its use by others. Some statutory guidance in applying the "fair use" doctrine is set forth in §107, but its scope remains incapable of real definition because of the endless variety of situations and combinations of the copyright material that may arise. As a result, the application of this doctrine has traditionally been, and will continue to be, the subject of constant litigation.

The recent case of, Weisberg v. U.S. Department of Justice, 631 F.2d 824 (D.C. Cir. 1980), raised the issue of whether, and on what terms, an agency may be required under FOIA to furnish members of the public with material copyrighted by private parties. In Weisberg, plaintiff submitted a FOIA request for photographs submitted by a private party to the FBI. The Government claimed these photographs were subject to protection under the Copyright Act, and therefore, could not be released because either they were not agency "records" or they were protected from release under the (b)(3) exemption. The request apparently was motivated by financial and accessibility considerations. In order to obtain copies of the photographs from the copyright holder, plaintiff would have had to pay $10.00 per print and would have received no reproduction rights. The cost for reproduction of the same photographs under FOIA was forty cents per copy. Pursuant to the advice of the submitter of these photographs, the FBI agreed to permit plaintiff to view the photographs but refused to provide him copies.

The District Court held that the agency must reproduce the photographs because they were agency records and the Copyright Act did not qualify as an exemption 3 statute. Weisberg v. U.S. Department of Justice, Civ. No. 75-1996 (D.D.C. Feb 9, 1978). The court held that the Copyright Act cannot qualify under §552(b)(3) because the equitable doctine of "fair use" failed to provide the agency with sufficient criteria for determining whether particular records should be withheld. Id., at 3-5.

The D.C. Circuit Court of Appeals upheld the lower court decision that the requested photographs constituted agency records. 631 F.2d at 827-28. It refused to decide, however, whether copyright material contained in agency records was subject to reproduction under the FOIA. "We intimate no view with respect to . . . the proper relationship between FOIA and the copyright laws." Id., at 829. Instead, the Appeals Court found that the lower court decision "subjected the government to a substantial risk of incurring . . . inconsistent obligations," Id., at 829, and that, therefore, Rule 19(a) of the Federal Rules of Civil Procedure provided for joinder of the submitter in an action determining releasability of the documents. Accordingly, the appellate court remanded the case in order that the submitter's interests in obtaining the full benefits of statutory copyright protection would be represented in the court's determination of whether release under FOIA was required.

The rationale underlying the decision of the D.C. Circuit Court is sound. Since non-parties to an action generally can be bound by prior judgments only where they have been fairly represented by one of the parties in the earlier litigation, the district court opinion requiring reproduction of the material may have subjected the Government to an action for copyright infringe-

ment by the submitter. Rather than subject the Government to this possibility, the interested party should be given the opportunity to establish that reproduction would violate the copyright laws. They are in the best position to supply the information necessary for this determination.

The Weisberg decision illustrates the burden which is placed on the Government in order to comply with a FOIA request for copyright material. Under existing law, a Government agency must resolve complicated legal issues involving copyright protection in connection with a FOIA request. Such decisions detract from the performance of the agency's principal function and misallocate the taxpayers' dollars. Yet, if this information is made freely available, the FOIA may be utilized as a vehicle to deny an owner the degree of protection afforded by the statute. In this event, the agency may incur liability for release of the copyright material.

Even if the Copyright Act is designated as an exemption 3 statute, however, an agency presumably still will be required to release material which constitutes a "fair use" of the material. This requirement does not alleviate all the problems set forth in the foregoing paragraph. By requiring an agency to identify only the existence of copyright material and its owner to a requester, however, it could be left to the parties involved to determine contractually or through litigation the proper scope, if any, of the use of such material, and its market price. More important, the Government would thereby be relieved of expending precious tax dollars and manpower resources on brokerage activities which it was never intended, and is ill-equipped, to fulfill.

4. The Privacy Act of 1974, 5 U.S.C. §552a (1976 & Supp. 1979). Pursuant to the above-referenced statute, an agency head may, by rules promulgated pursuant to 5 U.S.C. §553 (1976 & Supp. 1979), exempt from access certain systems of records set forth at §552a(j) and (k). The permissible statutory basis upon which the agency head may promulgate an exempting rule, and the limited categories of records systems for which the statute permits an exemption, reinforces the view that Congress decided to allow particular types of matters to be exempted from public access under the Privacy Act.

This conclusion has, in fact, been reached by several Circuit Courts of Appeals. See Painter v. Federal Bureau of Investigation, 615 F.2d 689 (5th Cir. 1980); Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979). However, the language of the Privacy Act itself also lends support to an argument that it was not intended to prevent disclosure of material that would be required to be disclosed under FOIA. 5 U.S.C. §552a(b)(2). This provision and its relationship to FOIA can fairly be characterized as unclear.

5. The Trade Secrets Act, 18 U.S.C. §1905 (1948).

Government contractors often make available certain confidential trade information to the Government in connection with their contracts. Such information is protected from mandatory disclosure by the (b)(4) exemption to the FOIA. Even where an exemption to FOIA does apply, however, courts have held that it only applies to permit, but not to require, the agency to withhold the information. Chrysler Corp. v. Brown, 99 S.Ct. 1705, 1713 (1979). As a result, many agencies have promulgated regulations permitting discretionary disclosure of information within the (b)(4) exemption.

Private parties have attempted to prevent discretionary disclosure under FOIA by instituting so-called "reverse-FOIA"

actions. One basis for bringing these actions has been §1905, which provides criminal penalties for Government employees who disclose information of the nature exempted from mandatory disclosure under FOIA pursuant to §552(b)(4), except where its disclosure is "authorized by law." Plaintiffs in "reverse-FOIA" suits contend that §1905 qualifies as a (b)(3) exemption statute and that, therefore, such information may not be released under FOIA. In response, parties seeking information have argued that even if §1905 is a (b)(3) statute, agency regulations authorizing discretionary disclosure under FOIA are sufficient authorization for purposes of §1905. In Chrysler v. Brown, supra, the court adopted the latter position as to all regulations promulgated pursuant to formal agency action under the Administrative Procedure Act. Id., at 1714-1717. By contrast, mere interpretative regulations or generalized statements of agency policy are not sufficient authorization to mandate disclosure of the types of information within the scope of §1905.

The purpose of the (b)(4) exemption and §1905, as made applicable through the (b)(3) exemption, is to assure private parties which provide confidential business information to the Government that such information will not be available to the general public. Of course, discretionary release of such information undermines this objective. As a result, private parties may be expected to cease making such information available or incur a financial risk associated with the possibility of its release. Accordingly, the Committee may wish to consider amending §1905 to expressly exclude release under FOIA from that "authorized by law."

In addition to the five statutes discussed in detail herein, it may be helpful for the Committee to take affirmative action to clarify whether the other statutes mentioned at the outset are intended by Congress to qualify as (b)(3) statutes. This would insure that information is protected where that is the Congressional purpose by removing from the courts the difficult task they now must undertake in construing the scope of the (b)(3) exemption.

I appreciate the opportunity to have been able to bring to your attention certain problems which the DOD has in administering the (b)(3) exemption under FOIA. My staff stands ready to assist the Committee in whatever way it can as this matter progresses.

Sincerely,

William H. Taft, IV

Senator HATCH. As I understand it, the proposers of the Freedom of Information Act and, I think, the Privacy Act indicated that the total costs of implementing these acts would be about $50,000 a year. Your story here is considerably different. You are saying that the costs just to DOD alone, not counting the hundreds if not thousands of other Government agencies, are almost $7 million a year, not counting indirect costs.

Mr. TAFT. That is correct, Senator. We are very sensitive, as you know, in the Defense Department to the charge of a cost overrun. With this act, one might have anticipated that the cost of compliance Government-wide would exceed $50,000. We try to administer it as economically as we can. I think we do a fairly good job of that.

Senator HATCH. Would you say that some of these requests are filed by groups, entities, or persons whose interests are antithetical to those of the United States of America?

Mr. TAFT. Some requests have been submitted by foreign nationals of countries that are not allied with us and, indeed, that we would not have considered to be our friends.

Senator HATCH. Have you had to comply with any of those requests?

Mr. TAFT. We have indeed. Also, a request could be made by an American citizen on behalf of such an organization.

Senator HATCH. Sure. There are organizations in this country today which constitute legal entities but which are considered to be unsafe entities with regard to national security matters in this country, or at least antithetical to the interests of the United States. Is that correct?

Mr. TAFT. Let me say that there are persons in the United States whom we would not clear for access to certain information.

Senator HATCH. The reason you will not clear them is because they appear to have interests that are not in the best interests of the United States of America. Is that correct?

Mr. TAFT. I want to be clear here. We consider other factors in deciding whether to deny a clearance to a person.

Senator HATCH. No, but does that concern you?

Mr. TAFT. It would concern us if we were aware of a person who received a clearance and who had interests that were antithetical to those of the United States. We would certainly seek to deny such persons a clearance and we would be very concerned if such person received a clearance.

Senator HATCH. Are you concerned about certain groups or individuals in our own society who may be citizens and fit in that category?

Mr. TAFT. Yes, sir, we are concerned about it. The reason why I am being hesitant is that my comments reflect the concern primarily of the domestic law enforcement forces that we have. It is not a military concern.

Senator HATCH. There are some nonprofit entities in this country of extreme concern to the intelligence experts in this country who are willing to interfere with National Government secrets, intelligence, and top-secret information. Is that not correct?

Mr. TAFT. Yes, indeed, they are. We are very concerned about such entities receiving our information.

Senator HATCH. With the act as presently constituted, is it not so that you may have to give information to even these groups whose interests are certainly not in the best interests of this country?

Mr. TAFT. It is absolutely correct that the act makes no distinction as to different types of requesters. The motivation for the request or the identity of the requester is simply not an issue under the act.

Senator HATCH. You have indicated that the Freedom of Information Act requires the Department of Defense to extensively index personnel grievance cases, including opinions and orders that are not even relied upon as precedents in later cases. You have also indicated that this imposes an extremely time-consuming and costly burden on the agency. Are there other agencies with similar problems and how would you propose to alleviate this problem?

Mr. TAFT. I would imagine that we have the largest number of problems of this sort. We have the largest number of Federal employees and we have a justice system inside our Department relating to those employees under the Uniform Code of Military Justice. I do not know that any other agency would have a specific similar situation that would be as serious as that.

From my experience at HEW, I cannot remember being required to maintain a system of records for this purpose that would be on the same scope as those which we are required to maintain in connection with article 138.

Senator HATCH. With regard to the second half of my question, we will leave that open. We will submit written questions to you to save some time here today. We we would appreciate your answers to those as soon as you can. We appreciate your efforts at the Department of Defense to work with us in trying to come up with a balanced bill that is in the best interests of all concerned.

Mr. TAFT. We would be delighted to do that. I will submit the answers to the questions that you provide us.

Senator HATCH. Thank you.

[Additional material follows:]

PROPOSED RESTRICTION ON DISCLOSURE OF TECHNICAL DATA UNDER FOIA

New exemption (b)(11), set forth in section 12 of the bill, would exempt from disclosure technical data that cannot be exported under Federal export laws. The proposed legislation is designed to prevent unauthorized export of critical technology which presently can result from compulsory disclosure of unclassified technical information to members of the public under the Freedom of Information Act. Congress has sought to limit the export of unclassified critical technology which might be used for purposes contrary to American interest in the Arms Export Control Act, 22 U.S.C. §2751, et seq., and the Export Administration Act of 1979, 50 U.S.C. App. §2404. These laws impose controls on the export of technology which may be used for purposes contrary to American interests. Yet the intent of these laws is being circumvented by making such information available pursuant to the Freedom of Information Act, since once this information is released to the public it is impossible to control its subsequent dissemination.

Concededly, the most effective way to protect sensitive technology would be to assign it a formal security classification, thereby extending it protection under the (b)(1) exemption. As a practical matter, however, the imposition of various safeguards, controls and procedures that would be entailed in classifying all sensitive technological information would impose a tremendous financial and administrative burden on the Department of Defense and private organizations working with such data, as well as make effective use of this data more difficult. Therefore, the Department of Defense currently imposes a wide range of protective measures short of formal classification to ensure protection of the technology. Procedures for the control, physical security, handling, storage, and transportation or communication of unclassified technology have been carefully designed in each instance to provide effective protection with the minimum possible interference with program activities. Since our informal procedures are not sufficient to protect this information under the Freedom of Information Act, the Department of Defense is now being forced to consider the classification option.

One specific example of the problem which would be remedied by enactment of the proposed 11th exemption concerns naval nuclear propulsion information. The national policy with respect to such information, in substantive part, is as follows:

> It is the policy of the U.S. Government not to disclose U.S. naval nuclear propulsion technology, classified or unclassified, including designs, or any portion of a U.S. naval nuclear propulsion plant, its land prototypes, or special facilities for their construction, support or maintenance, including any machinery, device, components, or equipment specifically developed or designed for use in such plants to foreign nationals or foreign governments except as such disclosure is made pursuant to a government-to-government agreement executed in accordance with Section 123(d) of the Atomic Energy Act of 1954, as amended.

The effect of this policy is to extend those provisions of the Atomic Energy Act which require a congressionally approved government-to-government agreement to be in effect prior to foreign dissemination of Restricted Data to all naval nuclear propulsion technology, regardless of its classification. This policy was established in 1965 at the request of Congress and with the strong support of the Departments of State, Defense, and Commerce and the Atomic Energy Commission. It was adopted because of the recognized importance of this technology to the national defense and, in particular, a grave concern that uncontrolled foreign access to such information could enable nations to acquire the kind of submarine capability necessary for a strategic missile weapons platform, thereby fostering the proliferation of nuclear weapons. To make these controls effective, however, it is also necessary to control public disclosure, since public disclosure obviously results in foreign disclosure.

The case of naval nuclear propulsion information also illustrates the problems involved in formal security classification. Such classification would require extensive physical modification to several hundred private industrial facilities now performing work under controlled but not classified conditions, a large expansion of security guard forces at many facilities, a large expansion of the need for security clearance investigations, etc. The cost of these measures, if applied to all program information for which protection from compulsory disclosure is necessary, would be prohibitive. Although no precise estimate is possible due to the wide geographic dispersion of the facilities and the numbers of components documents, and personnel involved, it can confidently be predicted that a great increase in overall program costs, amounting to many millions of dollars, would result from total classification of naval nuclear propulsion information. Even more critical would be the cost of classification in terms

of the time required to design, construct, and install our naval nuclear propulsion plants under fully classified conditions. Again, as a rough estimate, the delays which classified handling and control of program technology would cause in the utilization of information throughout the program conceivably could extend project times by as much as 25% to 50%. Under the Reagan Administration's program of fiscal constraint, such expenditures cannot be justified.

In addition, the effect of the large additional administrative and physical burden of total security classification on the willingness of private enterprises to perform program work must be considered. Private firms are already reluctant to enter this field because of the stringent technical criteria and administrative requirements associated with this work; some are leaving the field for commercial work, largely for this reason. If these vendors were required to make extensive modifications to their facilities, subject their employees to government security investigations and otherwise meet the criteria for eligibility to perform classified government security work, it is doubtful that many would wish to participate. The effect of total security classification on our relationship with our private contractors is not susceptible to precise evaluation, but we know it would be very damaging.

Finally, the proposed 11th exemption will not be utilized to restrict the flow of technological information which serves to promote competition among contractors of the Department of Defense where such restriction is not mandated by national security considerations. Court decisions have consistently held that agencies retain discretionary authority to release information subject to exemptions to the Act. See Chrysler Corp. v. Brown, 441 U.S. 281, 292-94 (1979). Department of Defense Directive 5400.7-R, Section 1-300, (published December 1980), provides a liberal policy of discretionary disclosure which will permit the release of technological information under FOIA in instances where there is no national security risk. Further, contractors will continue to be able to obtain technological information in accordance with DoD Directive 5100.36, "Defense Scientific and Technical Information Program" (October 2, 1981). Generally, this directive permits certification of contractors and prospective contractors having a legitimate interest in such information to register to obtain and utilize such material from the Defense Information Technical Center in a manner which does not jeopardize national security.

The foregoing discussion serves to illustrate the critical importance of enacting the proposed 11th exemption to the Freedom of Information Act. It will afford protection to sensitive technological information which may be subject to unrestricted dissemination without jeopardizing the competitive benefits resulting from its release to authorized defense contractors.

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Technology Transfers to the Soviet Union

By Caspar W. Weinberger

A few months ago a fisherman working off the coast of North Carolina picked up what turned out to be an intelligence gathering device neatly enclosed in a Soviet oceanographic current meter. This device and others like it are used to gather vital information about the U.S. Navy's activities and could be extremely harmful to us if employed in war.

At the heart of this device is a modern printed circuit board. It and several others have been brought to my office the past six months. Most were packaged for military purposes and all were designed for use in a wide variety of weapons systems, including ballistic missiles, "fire and forget" weapons, and guidance and control for aircraft, to name a few.

What surprised me most was that these sophisticated devices were not made in the United States. Nor were they produced in Europe or Japan. They were products of the Soviet Union.

Specialists in the Department of Defense tested these circuit boards carefully. They found many of the components, particularly the microcircuits, to be exact copies of "chips" made in the United States. In fact, a U.S. chip was put on the Soviet circuit board and worked properly. Such microelectronic circuits are used extensively in our strategic and conventional weapons systems. Clearly the Soviets have made remarkable progress in being able to copy and manufacture advanced electronic equipment of this kind.

Alarming Implications

How the Soviet Union got the manufacturing know-how and circuit design information to build these components is a story as complicated as its implications are alarming. The simple answer is that the Soviets have organized a massive, systematic effort to get advanced technology from the West. The purpose of this is to support the Soviet military buildup.

This unusual acquisition program follows two paths—openly whenever possible and clandestinely when not. The Soviets make a maximum effort to get technology from the West by claiming a need for equipment to be used in strictly civilian enterprises. An example is their effort to obtain modern medical equipment such as CAT scanners which require sophisticated computer technology to operate.

Using civilian cover, during the 1960s and 1970s the Soviets moved quickly to purchase electronics technology. Our bureaucracy was asleep to the danger of this, so nothing was done to prevent it. As a result, the Soviets were able to set up a number of specialized electronics factories – all of which are operated today as classified facilities.

Where they were unable to get either the U.S. or those who participate in the International Control System (COCOM) to yield advanced technology, the Soviets employed a number of clandestine means. Businessmen, engineers, scientists and workers have been bribed. Innocent-looking corporations have been created to buy equipment later sent to the U.S.S.R. Diplomats and official visitors have been used to ferret out items of interest. Neutral and nonaligned states are targeted for exploitation. And, where all else fails, intelligence missions have been run by Soviet agents.

The Soviets obtain considerable benefit from these complicated maneuvers. Each year they save billions of dollars in research and development costs by "borrowing" Western technology. They get hardware and know-how that is proven and trouble-free. These acquisitions can be, and often are, supported by additional developments in the West. Indeed, merely reading the full range of technical literature openly published gives the Soviets the ability to repair and maintain products they have acquired illegally.

The Soviets have organized a massive, systematic effort to get advanced technology from the West. The purpose is to support the Soviet military buildup.

But the most significant and troubling aspect of all this is how the Soviets use the equipment they have gathered to add to their military power. And this is our greatest concern.

An important part of our own national defense as well as the security of our allies and friends around the globe is the "quality edge" we have enjoyed for many years. This advantage is largely the result of the talent and skill produced by our free enterprise system. We have made use of this asset effectively in supporting our national defense programs. It is one of the pillars of our security.

Unlike some, who from time to time criticize our defense programs, the Soviets understand how important the quality edge is to us. Their actions prove that they mean to benefit from our technology. Thus, it is clearly in our best interest to prevent them from doing so and that is what this administration is trying to do.

President Reagan took the lead last July at the Ottawa summit conference when he appealed to our allies to tighten our international control system. We have worked hard to plan an effective high-level COCOM conference. The meeting, to be held in Paris next month, will be the first broad reconsideration of our technology control system in nearly 30 years. We will present new evidence to our allies on how the Soviet Union and Warsaw Pact are using Western technology to strengthen their offensive military capabilities. We want to conclude at that meeting a redefinition of the COCOM international control program.

I am also working to involve NATO. One of the peculiar aspects of the control system is that defense interests are poorly represented. For example, only the United States sends Department of Defense experts to COCOM, even though COCOM's main purpose is to safeguard technology that can be used for military purposes by the Soviet Union and Warsaw Pact. At the national level, only the U.S. and France allow defense specialists to review regularly proposed technology exports to the Soviet Union. The result is that many judgments are made without expert participation, and a good deal of damage results, as in the case of highly advanced communication switching equipment obtained by the U.S.S.R. from Western Europe. Unfortunately this equipment can also be used to add greatly to the Soviets' command and control abilities. My hope is that the NATO countries can work together to help change the reviewing procedures for technology transfer issues.

Need Public Understanding

We cannot, however, achieve all we would like to without public understanding. In particular we need industry to take the lead and inform both management and employees of the dangers. In sensitive factories we need voluntary security committees to safeguard essential designs and manufacturing know-how. Industry associations can play an important part in protecting our national security by advising member companies on appropriate measures and internal safeguards.

Businessmen, in general, can be more supportive by recognizing the fact that the long-term interests in peace and security they share with their stockholders far outweigh the short-term gains which the sales of certain equipment offer. If we ignore this and proceed with business as usual, current sales may please some but they will yield the most unpleasant dividends in the future.

Mr. Weinberger is the U.S. Secretary of Defense.

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Senator HATCH. Our next two witnesses are Steven R. Dornfeld and Ted Capener, representing the Society of Professional Journalists, Sigma Delta Chi.

Mr. Dornfeld has been a Washington correspondent for Knight-Ridder Newspapers since October 1980. For the prior 10 years, he was a political writer with the Minneapolis Tribune of Minnesota. Mr. Dornfeld was a professional humanities fellow at the University of Michigan. He has served on the national board of the Society of Professional Journalists, Sigma Delta Chi, since 1973 and is currently the national secretary of the society. He is nominee for president-elect of the society in 1981–82.

I am proud to welcome Ted Capener to our committee as a fellow Utahan who is vice president of news and public affairs for Bonneville Broadcasting Corp. of Salt Lake City, Utah, which owns 13 radio and television stations across the Nation. Until his recent relocation to Salt Lake City, he was for 9 years Washington bureau chief of Bonneville Broadcasting. Prior to that, he was news director for 7 years of KSL television and radio in Salt Lake City, Utah.

We are very proud to have you with us today and to have your testimony. Mr. Dornfeld and Mr. Capener are accompanied by Bruce W. Sanford of Baker & Hostetler, legal counsel to the Society of Professional Journalists, Sigma Delta Chi. We are also happy to have you here as well, Mr. Sanford. We are well aware of your law firm and know what a fine firm it is.

We are very pleased to have you gentlemen from the media here today. We look forward to hearing your testimony in whatever order you choose to present it.

STATEMENT OF STEVEN R. DORNFELD, WASHINGTON CORRESPONDENT, KNIGHT-RIDDER NEWSPAPERS, NATIONAL SECRETARY OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ACCOMPANIED BY TED CAPENER, VICE PRESIDENT OF NEWS AND PUBLIC AFFAIRS, BONNEVILLE BROADCASTING CORP., SALT LAKE CITY, UTAH, AND BRUCE SANFORD, ESQ., BAKER & HOSTETLER, WASHINGTON, D.C.

Mr. DORNFELD. Thank you very much, Mr. Chairman. We greatly appreciate the opportunity to be with you today and to participate in this opening day of legislative hearings on the Freedom of Information Act.

For the record, my name is Steve Dornfeld. I am a Washington correspondent for Knight-Ridder Newspapers and national secretary of the Society of Professional Journalists, Sigma Delta Chi.

I appear here today on behalf of the society which, as you may know, is the oldest, largest, and most representative organization of journalists in the United States. Founded in 1909, the society today has more than 28,000 members in all branches of the media—print and broadcast.

As you mentioned, I am accompanied here today by Ted Capener, vice president of news and public affairs for Bonneville Broadcasting in Salt Lake City, and by Bruce Sanford of Baker & Hostetler here in Washington who is our society's first amendment counsel.

If you will permit me, I will try to summarize my prepared testimony which has been submitted to you this morning so that we will have sufficient time to hear from Ted Capener, who is here

to tell you how the FOIA has been used in one randomly selected State, the State of Utah.

Senator HATCH. I take it he may have an opinion that might be decidedly different from my own.

Mr. DORNFELD. It is possible.

The society would appreciate it, Mr. Chairman, if you would make our complete written statement a part of the record of this hearing.

Senator HATCH. Without objection, the complete written statement and anything else that your society cares to contribute will be made a part of the record following your oral presentation. We have much respect for your society. Of course, being politicians, that respect is not always self-engendered.

Mr. DORNFELD. Thank you very much, Mr. Chairman.

The Society of Professional Journalists comes here today to document what we believe to be the public benefits that have flowed from access to information under the FOIA.

Journalists use the act constantly, but no statistics can reflect the enormous amount of Government information received from the mere presence of the act on the books. Most agencies voluntarily disgorge information, sometimes reluctantly to be sure, at the mere mention of a possible FOIA request.

Russell Roberts, president of the American Society of Access Professionals and Director of the FOIA/Privacy Division of the Department of Health and Human Services, recently confirmed that HHS personnel are encouraged to avoid formal FOIA requests by providing requested material voluntarily. He tells us:

> We figure that we do not want to give the press two stories when we mess up. If we try to withhold information, they hit us with one story about our mistake and another about how hard we made it for them to do the story.

Mr. Chairman, the bureaucratic reverence for secrecy is as old as ancient civilization when Roman soldiers returning from battle were prohibited from informing citizens of their occasional defeats. Our society believes it is the presumption favoring openness in Government, the presumption favoring disclosure by the civil service that in a historic sense strengthens our Nation at time when we rely as never before upon a Federal bureacracy to guide our destiny.

The Reagan administration may well give us admirable improvements in the management and organization of the Federal Government, but this possible renovation cannot realistically alter the need for an act assuring Americans the access to information about governmental operations they need if they are to participate in the deliberations of a democracy.

In short, the act is a two-edged sword for all seasons. It gives the public a weapon to prevent the bureaucracy from overwhelming it, and discourages lord knows how many public officials and bureaucrats from contemplated abuses of authority.

The FOIA has always been and always will be a pain in the side of public employees. It was always meant to be. If the act is amended to increase delays or costs or otherwise discourage use of the FOIA, our society is convinced that the ramifications to the public will be devastating.

Voluntary government disclosures would be both less frequent and less informative. Agency employees, now assured that corruption, waste, and mismanagement can be legally exposed through the FOIA, would retreat to an underground system of leaks or would provide no information at all.

Journalists would be relegated to cultivating underground sources and would be largely dependent upon them for information. Unofficial leaks and statements would proliferate at a time when journalists are striving to rely more heavily on attributed sources and documentation.

Finally, we believe that press organizations located outside of the Washington-Boston corridor, which now enjoy access to information equal to those of us on the east coast, would be unable to gather information about the Federal Government and would be forced to rely on journalists who serve different readers with different interests. This was the world that existed in 1966 before the Freedom of Information Act was approved.

As the Republican Policy Committee stated when it endorsed the passage of the act back in 1966: "In this period of selective disclosures, managed news, half truths, and admitted distortions, the need for this legislation is abundantly clear."

A number of proposals for amending the FOIA are currently before this subcommittee. Some of these amendments respond to agency complaints that compliance with the act is too costly and time consuming. Others are directed to claims by agencies that compliance hampers their effective operation.

Our society believes that most of these agency concerns were anticipated and effectively dealt with by Congress when it drafted the act in 1966. Congress crafted a workable statutory framework that carefully balances the public's needs for information about its Government with the necessity that the Government operate efficiently and effectively.

In 1974 and again in 1976, Congress reaffirmed the essential soundness of that balance and cautiously engaged in legislative fine-tuning designed to achieve the original statutory purpose. Additional fine tuning may again be in order. Times change and needs change.

We are all aware that private business and their legal counsel have been major users of the act, more than journalists, scholars, and others seeking to disseminate information for public purposes. Taxpayers should not be required to foot the bill for private litigants to research their cases in Government files.

The society could support legislation designed to reduce costs associated with use of the act in private civil litigation. The original legislative purpose of the act, we believe, was not to create a Government subsidized discovery vehicle for the antitrust bar. At the same time, any such legislation should seek to expedite the handling of requests made by persons who indicate that the information is sought for public purposes such as news dissemination.

Even if new legislation can reduce the costs associated with the private use of the FOIA, our society believes that all of us should frankly acknowledge that Government responsiveness and Government accountability do cost something.

Since we have heard today from a representative of the Department of Defense, I would note that today our Nation spends more than $100 million a year on military bands. It does not seem unreasonable to us that our Nation spend half that amount or even twice that amount on freedom of information. The result may not be as uplifting as a John Philip Sousa march, but I think it will certainly be more valuable in preserving our democratic system of Government.

Senator HATCH. That is an interesting point.

Mr. DORNFELD. It is our understanding that the Department of Justice is currently undertaking a thorough review of the FOIA with an eye toward presenting Congress with a comprehensive package of reform proposals later this year. The society hopes to be able to consult with Assistant Attorney General Rose and his office about such proposals, and about the Justice Department's administration of the act.

Prudence dictates, we believe, that this subcommittee await the Reagan administration's proposals before embarking on piecemeal efforts to amend the FOIA. Deceptively simple solutions may well achieve nothing more than upsetting the delicate balance that has undergirded the FOIA for the last 15 years.

In presenting the society's specific views concerning the proposed legislation currently before this subcommittee, we express two hopes at the outset: First, that you will again solicit the views of our society and other press groups once the Justice Department has presented its comprehensive study of the FOIA and, second, that you will exercise restraint in considering any amendment or fine tuning of the act, performing any needed adjustments with screwdrivers and not crowbars.

Any perceived problems should be corrected gently, with precision, leaving intact the tools needed to fulfill the act's primary purpose of providing ready access to Government information for the public and the public's surrogate, the press.

As Chief Justice Burger wrote in the landmark *Richmond Newspapers* case: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

With that, Mr. Chairman, I would stop. As you know, the society has provided written testimony that offers more detailed comments on the proposed legislation before the Senate, namely, Senate bills 587, 1235, and 1247. We would be pleased to answer any questions you might have, but before we move on to that part, I would like to introduce Ted Capener.

Senator HATCH. Thank you. Your statement was very reflective and, I might add, very persuasive in many ways. I enjoyed it. What has impressed me is that you have admitted that there needs to be some fine tuning here. We need to really study this act thoroughly to discover what we can do to institutionalize it better than ever, but for the benefit of everybody concerned. I was very much interested by your statement.

[The prepared statement of Mr. Dornfeld follows:]

THE PREPARED STATEMENT OF STEVEN R. DORNFELD

INTRODUCTION

Thank you, Mr. Chairman, for this opportunity to participate in the opening day of legislative hearings on the Freedom of Information Act ("FOIA").[1/]

My name is Steve Dornfeld, and I am a Washington Correspondent for Knight-Ridder Newspapers and National Secretary of the Society of Professional Journalists, Sigma Delta Chi. I am here today on behalf of the Society which, as you may know, is the oldest, largest and most representative organization of journalists in the United States. Founded in 1909, the Society has more than 28,000 members in all branches of the news media -- print and broadcast.

Accompanying me today is Ted Capener, Vice President of News and Public Affairs for Bonneville Broadcasting Corp. in Salt Lake City, and Bruce W. Sanford, a partner of Baker & Hostetler in Washington, legal counsel to the Society.

[1/] 5 U.S.C. § 552 (1976). Mr. Dornfeld will capsulize this prepared testimony in his appearance before the Subcommittee and Mr. Capener will testify briefly as to the use of the FOIA by local news media in one particular state, Utah.

The Press and the FOIA

The Society has been an active proponent of the FOIA since its inception. Three of our members -- Clark Mollenhoff of the Des Moines Register & Tribune, Julius Frandsen of United Press International, and V. M. Newton of the Tampa Tribune chaired the Society's Freedom of Information Committee and were instrumental in forming a group of journalists that worked closely with Congress in drafting the Act. In recent years, the Society has funded the lion's share of the Freedom of Information Service Center here in Washington, which has assisted hundreds of journalists in using the Act. A copy of the Service Center's widely distributed publication, How To Use the Federal FOI Act, is submitted herewith to illustrate how the Society has devoted its resources to encouraging use of the Act.

Our experience at the FOI Service Center has confirmed the Society's expectation that the FOIA would prove a valuable tool for professional journalists in their efforts to gather and report newsworthy information to the public. In 1980, the Service Center answered some 300 telephone requests for assistance from journalists seeking access to government information. In the first half of 1981, the Center has already handled another 300 requests.

The burgeoning activity at the Service Center is just one indication that the Act is a widely employed tool

of journalists.[2] Through formal requests or merely threatened requests under the Act, the public and the public's surrogate, to use Chief Justice Burger's term,[3] the press has been able to gain access to a wide range of information that has resulted in countless news reports of public interest. Without the FOIA, the public might never have received the news that:

-- Ten elderly patients at a private Philadelphia nursing home died in 1964 and 1965 while they were being used as subjects in a drug experiment.[4]

-- Approximately one-third of all small corporations regularly underpaid Federal income taxes in the late 1960's.[5]

-- Tests of drinking water near uranium mines in western New Mexico uncovered high levels of radioactivity and poisonous waste.[6]

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[2] In recent years, critics of the Act, chiefly government employees who have everything to gain from dismantling the FOIA, have suggested that press usage of the Act is minimal. The Society knows otherwise. Journalists use the Act constantly, although statistics cannot measure the usage accurately since many, if not most, reporters do not identify themselves when making FOIA requests. Nor can statistics reflect the enormous amount of government information received from the mere presence of the Act on the books. Most agencies voluntarily disgorge information, sometimes reluctantly to be sure, at the mere mention of a possible FOIA request.

[3] Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814,2825 (1980) (Burger, C.J., announcing judgment).

[4] New York Times, Nov. 16, 1975, at 46, col. 1.

[5] New York Times, July 21, 1975, at 31, col. 6.

[6] New York Times, Aug. 20, 1975, at 18, col. 3.

-- Organizations that received Federal grants to help fight alcoholism misused the taxpayers' money to influence legislation.[7/]

-- Colleges and Universities engaged in a widespread practice of sloppy bookkeeping and possible misuse of hundreds of millions of dollars of federal funds.[8/]

-- A drug treatment center in Hawaii converted food stamps to make illegal cash payments to employees.[9/]

No laundry list of news stories can do much more than symbolize the enormous public benefits that have been realized because of press access to information under the FOIA. Indeed, the press has found that the mere existence of the FOIA has led government agencies to disclose information freely and candidly without the need for formal requests. Russell Roberts, president of the American Society of Access Professionals and director of the FOIA/Privacy Division of the Department of Health and Human Services, recently confirmed that HHS personnel are encouraged to avoid formal FOIA requests by providing requested material voluntarily. "We figure that we don't want to give the press two stories when we mess up," Roberts explained to our staff people at the FOI Service Center. "If we try to withhold information,

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7/ New York Times, Jan. 16, 1977, at 35, col. 1

8/ New York Times, Jan. 8, 1978, at 1, col. 3.

9/ Honolulu Star-Bulletin, Sept. 1, 1979, at A1.

they hit us with one story about our mistake and another about how hard we made it for them to do the story." 10/

Mr. Chairman, the bureaucratic reverence for secrecy is as old as ancient civilization when Roman soldiers returning from battle were prohibited from informing the citizens of their occasional defeats. The Society believes it is the presumption favoring openness in government, the presumption favoring disclosure by the civil service, that, in a historical sense, strengthens our nation at a time when we rely as never before upon a federal bureaucracy to guide our destiny. The Reagan administration may well give us admirable improvements in the management and organization of the federal government. But the renovation cannot realistically alter the need for an Act which assures Americans the access to information about government operations which they need if they are to participate in the deliberations of a democracy. In short, the Act is a two-edged sword for all seasons: it gives the public a weapon to prevent a bureaucracy from overwhelming it and its sharp assurances

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10/ Interview with Russell Roberts, Freedom of Information Service Center (May 1981).

of openness prevent Lord knows how many public officials from contemplated abuses of authority. The Act has always been and will be a pain-in-the-side of public employees. It was always meant to be.

If the Act is amended to increase delays or costs or otherwise discourage use of the FOIA, the Society is convinced that the ramifications for the public would be devastating. Voluntary government disclosures would be both less frequent and less informative. Agency employees, now assured that corruption, waste and mismanagement can be legally exposed through the FOIA, would retreat to an underground system of leaks or would provide no information at all. Journalists would be relegated to cultivating such "underground" sources and would be totally dependent upon them for information. Unofficial statements and "leaks" would proliferate at a time when journalists are striving to rely more heavily on attributed documentation rather than unattributed allegations. Press organizations located outside the Washington, D.C.-Boston corridor, which now enjoy access to information equal to their east-coast colleagues, would be unable to gather information about the Federal government and would be forced to rely on journalists who serve different readers with different interests.

This was the world that existed in 1966 when the FOIA was enacted. As the Republican Policy Committee stated when it endorsed passage of the Act, "[I]n this period of selective disclosures, managed news, half-truths and admitted distortions, the need for this legislation is abundantly clear."11/

The Proposed Amendments

A number of proposals for amending the FOIA are currently before this Subcommittee. Some of these amendments respond to agency complaints that compliance with the Act is too costly and time-consuming. Others are directed to claims by agencies that compliance hampers their effective operations. The Society believes that most of these agency concerns were anticipated and effectively dealt with by Congress when it drafted the Act in 1966. Congress crafted a workable statutory framework that carefully balances the public's need for information about its government with the concomitant necessity that government operate efficiently and effectively. In 1974 and again in 1976, Congress reaffirmed the essential soundness of that balance and cautiously engaged in legislative fine-tuning designed fully to achieve the original statutory purpose.

11/ See Republican Policy Committee Statement on Freedom of Information Legislation, S.1160 (June 20, 1966), reprinted in Staff of Senate Comm. on the Judiciary, 93d Cong. 2d Sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 59 (Comm. Print 1974).

Additional fine-tuning may again be in order. Times change, needs change. We are well aware that private business and their legal counsel have been the major users of the Act, more than journalists, scholars and others seeking to disseminate information for public purposes. Taxpayers should not be required to foot the bill for private litigants to research their cases in government files. Indeed, as Deputy Attorney General Edward Schmults recently noted before the Second Circuit Judicial Conference:

> Just as the majority of requests under the Freedom of Information Act serve purposes other than the one for which it was enacted, those unintended uses significantly slow the processing of requests for information that would serve the goal of informing the electorate. Reducing the former would obviously allow us to speed up responding to the latter. 12/

The Society could support legislation designed to reduce the costs associated with use of the Act in private civil litigation. The original legislative purpose of the Act did not envision creating a government subsidized discovery vehicle for the antitrust bar. At the same time, any such legislation should seek to expedite the handling of requests made by persons who indicate that the information is sought

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12/ See E. C. Schmults, The Freedom of Information Act -- Is It Working Correctly? (May 9, 1981) (remarks of Deputy Attorney General Edward C. Schmults, Second Circuit Judicial Conference) (Antitrust Division of Department of Justice estimate that more than half of its FOIA requests were from actual or potential litigants in private antitrust suits).

for public purposes such as news dissemination.

To quote James Madison, as the draftsmen of the Act found so appropriate to do, "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both."[13/]

Even if new legislation can reduce the costs associated with "private" use of the FOIA, the Society believes we should all frankly acknowledge that government responsiveness and accountability does cost something. A government that can spend $1.2 million to preserve a Trenton, New Jersey sewer as a historical monument can surely afford to spendmany times that amount to ensure that the American people are able to oversee the operation of their government.

It is our understanding that the Department of Justice is currently undertaking a thorough review of the FOIA with an eye toward presenting Congress with a comprehensive package of reform proposals later this year. In the meantime, the Society is concerned that well-intentioned

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13/ S. Rep. No. 813, 89th Cong., 1st Sess. 2, 3. (1974); 112 Cong. Rec. 13007 (1974) (remarks of Rep. King).

proposals to amend the Act will eschew laudable efforts at additional fine-tuning in favor of deceptively simple solutions that threaten the delicate balance that has undergirded the FOIA for 15 years. Prudence dictates that this Subcommittee await the Administration's proposal before embarking on piecemeal efforts to amend the FOIA. In presenting the Society's specific views concerning the proposed legislation currently before this Subcommittee, we express two hopes at the outset: first, that you will again solicit the views of the Society and other press groups once the Justice Department has presented its comprehensive study of the FOIA; and, secondly, that you will exercise restraint in considering any amendment or fine-tuning of the Act, performing any needed adjustments with screwdrivers, not crowbars. Any perceived problems should be corrected at their precise source, leaving intact the tools needed to fulfill the Act's primary purpose of providing ready access to governmental information for the public and the public's surrogate, the press.

Time Limits

S. 587, introduced by yourself, Mr. Chairman, would extend the FOIA's time limits to permit an agency an additional 60 days to respond to requests for every 200 pages of documents no matter who makes the request.[14/]

14/ S. 587, 97th Cong., 1st Sess. §2 (1981).

The Society is unconvinced that existing time limits pose an onerous burden on administrative agencies. Since 1976, it has been well-settled that courts will not require an overburdened agency to compile voluminous material at a moment's notice, absent some special need by the requester.[15] For example, it currently takes the FBI eight months to answer a typical FOI request. Or, as the Defense Department testified during 1977 oversight hearings, "[p]eople are not unreasonable. If you will call them and tell them that their request encompasses 100,000 documents, they will understand that obviously you are not going to be able to respond in ten days. From what I understand, the Defense Department has very little trouble in people voluntarily consenting to extensions."[16]

Most importantly, however, S.587's time limits would apply not only to civil litigants, but also to journalists, scholars and others who seek the timely release of information for the public's benefit. Simply put, S.587 would cripple the Act for the press. If Congress extends time limits to 60 days, experience suggests that some agencies will take six months. If extended to six months, some will take two years. Better training procedures and a greater

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15/ See Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976).

16/ Staff of Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess., Agency Implementation of the 1974 Amendments to the Freedom of Information Act 68 (Comm. Print 1980).

commitment by the government to getting information out on time would serve us all in the way the Act was intended. In short, the current time limits are realistic for most requests, at least where the information is sought on behalf of the general public. For these requests, the current limits are needed as a cudgel to remind agencies that information delayed is information denied.

An Exemption for the CIA

S.1235 would realistically exempt the Central Intelligence Agency ("CIA") from the FOIA. The bill would eliminate judicial review and thereby prohibit courts from ordering the CIA to release anything it chooses to keep secret.[17/] The bill is also cast so broadly that a document containing even a word of exempt material could be withheld entirely.[18/]

The Society believes that S.1235 addresses a problem that does not exist. The FOIA does simply not threaten national security -- it enhances it by building a well-informed electorate. The FOIA does not endanger the CIA's intelligence gathering operations. Apparently, it is an annoyance for the CIA at times, but public servants often find public accountability annoying just as retailers

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17/ S.1235, 97th Cong., 1st Sess. § (b) (1981)

18/ Id. at § (b).

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sometimes find customers annoying, ranchers find their cattle annoying, or spouses find each other annoying. The CIA commands power and respect on Capitol Hill, but the Society and the public could respect the agency's professionalism a bit more if it would cease the bureaucratic overreaching that has characterized its attempts in recent years to obtain a virtual exemption from the FOIA.

Under the current classification order, Executive Order 12065, the CIA has ample discretion to protect our national security.[19/] Even the agency concedes that not a single word of classified information has ever been released by a judge under the FOIA over its objection.

The FOIA, as currently drafted, is designed to complement Executive Order 12065, not override it. FOIA Exemption (b)(1) ensures that classified documents will be reviewed by the agency when the typical six-year initial classificiation period lapses.[20/] This procedure permits proper classificiation for as long as 30 years. Indeed, the President retains the broad authority to extend even that time by further executive order. The FOIA in no way limits the ability of the CIA to withhold classified material from public view.

19/ Exec. Order 12065, 43 Fed. Reg. 23,949 (1978).

20/ 5 U.S.C. § 552(b)(1).

Experience demonstrates that the FOIA has been employed by responsible journalists to gain access to much useful information about this crucial agency. As a result of these disclosures, the American people have had an opportunity to develop a deeper appreciation of the effective bounds within which the agency must function. To deny the press and public access to virtually all information about the CIA simply because of agency complaints about administrative burdens is to remove the most effective means of public accountability available to the American people. Without the FOIA, the public will have no alternative but to trust the CIA, an agency that has, sadly, betrayed that trust before.

An Exemption for the FBI

In a similar manner, S.587 responds to the Federal Bureau of Investigation's ("FBI") claims that its operations are somehow damaged by the FOIA. Specifically, S.587 would create a ten-year moratorium on the release of any information by the FBI.[21/] The agency would be permitted to refuse to release information not simply for ten years after it is gathered, but for ten years after a case is closed or a convicted participant is released from prison.[22/] Under S.587, the FBI could withhold information that arguably invades

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21/ S.587, 97th Cong., 1st Sess. § 7 (1981).

22/ Id. § 7(b).

personal privacy for as long as 25 years after the person to be protected has died.[23/] Finally, S.587 gives the agency broad authority to withhold information about "conspiratorial activity," which presumably includes any concerted action by two or more persons.[24/]

The Society believes that the practical effect of S.587 would be to provide the FBI with a blanket exemption from the FOIA. From the perspective of journalists, the various moratoria contained in S.587 would extend far beyond the newsworthiness of the requested information. They would prevent any disclosure until long after such disclosure would serve any useful function in ensuring the public accountability of the agency. The public has an immediate and laudable interest in overseeing the operations of the FBI, so long as that oversight does not disrupt legitimate law enforcement activities.

To that end, the FOIA, through Exemption (b)(7), currently permits the FBI to withhold a great deal of information: anything that would harm an ongoing investigation, reveal a confidential source, invade individual privacy, expose investigative techniques, endanger law enforcement personnel, or deprive a criminal defendant of a fair trial.[25/] Precisely because these safeguards are

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[23/] Id. § 7(a).

[24/] Id.

[25/] 5 U.S.C. § 552 (b)(7).

already built into the FOIA, the FBI is unable to cite a single instance in which an investigation has been hampered due to an FOIA disclosure.

On the contrary, most information revealed to the press under the FOIA has simply been embarrassing to the FBI, such as former director Hoover's efforts to investigate the private lives of disfavored authors, actresses and members of Congress.[26/] It is understandable that the agency would prefer not to have its dirty laundry hung out in public. Nevertheless, the Society submits that the antidote for agency malfeasance is a more responsible agency, not a more secret one. Since 1966, we believe the FOIA has gone a long way toward ensuring that responsibility.[27/]

Business Information

S.1247, introduced by Senator Dole, responds to claims by the business community that it, too, has been "damaged" by the FOIA.

26/ New York Times, Nov. 24, 1976, at L 13, col. 4.

27/ Unfortunately, however, the FBI's intransigence in refusing to respond forthrightly to FOIA requests remains legendary. The agency habitually, and contrary to clear legislative history, refuses to answer any requests seeking information about a third person. It regularly ignores the Act's time limits and scrutinizes each request in such minute detail that five times as many agency officials are required to consent to release of information as are required in order to withhold information. In a recent case study, New York Times columnist James Reston provided a revealing illustration of how the FBI refused to provide him with requested information about the Jamestown tragedy. See Reston, The Jonestown Papers, The New Republic, Apr. 25, 1981, at 16-17.

S.1247 would create a "reverse" freedom of information procedure that would permit businesses to secure injunctive relief against the disclosure of information under the Act.[28/] It would require agencies to notify any person who submits information as well as any person about whom information is submitted that an FOIA request has been made and of their rights under the reverse-FOI system.[29/] The agency must wait ten days for the individual to respond before disclosing the requested information, and must provide the individual with a hearing, if one is requested.[30/] Only the notified individual would be entitled to attend this hearing -- apparently, the requester has no standing to appear and argue the propriety of release.[31/] After the hearing, the agency must wait an additional 30 days before it issues a ruling.[32/] If the agency opts for release, the losing party may seek an injunction and de novo review in federal district court.[33/]

Once again, the Society believes that S.1247 responds to an illusory problem, anticipated by the drafts-

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28/ S.1247, 97th Cong., 1st Sess. (1981).

29/ Id. § 2.

30/ Id.

31/ Id.

32/ Id.

33/ Id.

men of the FOIA and dealt with successfully in Exemption (b)(4).[34/] Professor Russell Stevenson's report, which you have heard about today, establishes that trade secrets are, in fact, being protected.[35/] His findings coincide with our experience that no agency that wishes to maintain a working relationship with its clientele is going to disclose classified information carelessly. It is not surprising, therefore, that the business community has been unable to document any concrete instances of damage it has suffered at the hands of the FOIA. Nor is it surprising, as the Securities and Exchange Commission can tell this Subcommittee, that American business does not relish public disclosure even when their activities touch upon public funding or public regulation.

Even if some fine-tuning in the (b)(4) exemption is warranted, however, the broad brush approach of S.1247 would erect a serious and unnecessary obstacle in the path of the timely disclosure of information of public interest. The additional delays inherent in the reverse-FOI system would give agencies and individuals alike a powerful tool to delay disclosure until its value to the public has dissipated. This unprecedented power could be wielded by an unlimited number of persons -- every name in every record, every person who provides any information to the agency. Documents with no conceiveable confidentiality or privacy

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34/ 5 U.S.C. § 552 (b)(4).

35/ R. Stevenson, Jr., Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4 (Dec. 15, 1980).

interest would remain secret for many months while the elaborate and costly administrative process plays itself out.

If a reverse-FOI procedure is needed, it is surely not necessary for every record. Any procedure can be easily limited to claims of truly confidential business information, and any submitter can be required to inform the agency that certain records contain trade secret information. Notice to every person named is simply excessive.

In addition, if a submitter is permitted to assert claims of confidentiality, we agree with Professor Stevenson that agency review should take place upon release of the information rather than at the time of submission.[36/] Otherwise, a company could effectively seal a record by stamping it confidential at the time of submission. Commercial information often loses its confidential character -- or sometimes gains it -- over time. Review at the time of release would provide the best method of protecting truly confidential information.

Finally, if judicial review is included in a reverse-FOI system, the Society believes it should be upon the agency record, not a de novo review. The FOIA is designed to provide for the timely disclosure of information.

36/ Id.

A de novo review would constitute a time-consuming and costly process that is manifestly unnecessary once the agency has made a considered judgment to release the requested information.

Conclusion

We close, as we began, by cautioning this Subcommittee to review proposals to amend the FOIA carefully. Proposed legislation must remain faithful to the FOIA's original purpose of ensuring that the public's business is conducted in public. Indeed, efforts at legislative fine-tuning should seek to enhance the ability of the press and public to obtain information from government. In the near future, we urge this Subcommittee to consider legislation that would, inter alia, (1) minimize delay by providing for prompt access to information requested in the public interest; (2) reduce the often preclusive costs of securing such information by cabining agency discretion to refuse to waive fees when the public interest is served by disclosure; and (3) enact into law a clear presumption in favor of disclosure absent demonstrable harm. In addition, we would ask Congress to check the proliferation of so-called (b)(3) exemptions by requiring that this Subcommittee be given a mandate to review proposed (b)(3) exemptions prior to enactment.[37/]

37/ Indeed, the Society finds it somewhat remarkable that no authoritative, comprehensive list of enacted (b)(3) exemptions even exists, We would urge congressional action to provide for an official compilation at the earlist opportunity.

Fifteen years of experience have demonstrated that the FOIA serves as a useful complement to constitutionally guaranteed rights of freedom of speech and of the press. In the landmark Richmond Newspapers case, Justice John Paul Stevens emphasized that "the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government."[38/] As the Chief Justice wrote in Richmond Newspapers, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[39/] Whether legislatively or constitutionally created, those rights should not be abrogated absent a showing of serious and demonstrable harm, especially where, as here, legitimate governmental interests can be more narrowly achieved.

Thank you, Mr. Chairman.

38/ 100 S.Ct. at 2831 (Stevens, J., concurring).

39/ Id. at 2825 (Burger, C.J., announcing judgment).

Senator HATCH. Mr. Capener?

STATEMENT OF TED CAPENER, VICE PRESIDENT OF NEWS AND PUBLIC AFFAIRS, BONNEVILLE BROADCASTING CORP., SALT LAKE CITY, UTAH

Mr. CAPENER. Thank you very much, Mr. Chairman.

Before I begin, I would like to ask that a column which appeared in the Deseret News on Monday evening be entered as part of the record.

Senator HATCH. Without objection, it will be so entered. We have read the column and we think it states pretty accurately at least some aspects of this matter.

[Material follows:]

[From the Deseret News, Salt Lake City, Utah, July 13, 1981]

ALTER THE INFORMATION LAW?

(By Milton Hollstein)

(Dr. Hollstein is a professor of communication at the University of Utah.)

The Deseret News Pinpoint investigative team used the federal Freedom of Information Law to blast out information about nursing homes in the files of the HEW regional office in Denver. Dale Van Atta used it to get stories that led to upgrading the security at Tooele Army Depot. The Tribune's Bob Bryson successfully filed a demand for the FBI report on the John Singer shooting.

These cases, and lots of other like them, show why newsmen here ought to be more than casually interested in attempts of the Reagan administrative to alter the law.

This week Sen. Orrin Hatch's Judiciary subcommittee will begin hearings into how well the law has worked and whether its exemptions (there are nine) ought to be broadened, essentially to exempt the FBI and CIA records. One of those who will testify is Ted Capener, who has just returned to Salt Lake City as vice president of news and public affairs for Bonneville International after nine years as KSL's Washington bureau chief.

The act became law, significantly, July 4, 1967, and was strengthened in 1974. It gives anyone the right to get a document from any federal agency except in cases specifically exempted, such as trade secrets. If the request is denied, petitioners can go to the federal courts. However, the Justice Department just last May gave greater power to federal agencies to fashion their own release policies.

Despite the demonstrated usefulness of the law locally, I haven't found great concern among Utah newspeople about the impending changes. (On the national level, a coalition of groups is fighting the alternations.)

One reason the opposition is not more militant is that everyone recognizes some loopholes are needed, and that there's no easy way to close those existing. No one wants the Russians to be able to demand access to American codes.

Another is that most good reporters have cultivated contacts in departments who can make information available without a formal demand. In some cases newspeople have found that using the law is not only cumbersome but sometimes also counterproductive. There's a long wait, up to a month, for the agency to produce the records and a copying expense. Sometimes the records are edited in the agency. In the report Bryson got, for example, the names of the officers involved in the shooting had been blacked out.

Because he has wide contacts, the News's man in Washington, Gordon Eliot White, did not have to resort to the law to get material for the series of stories that brought him the 1978 Raymond Clapper Memorial Award for exceptional meritorious reporting. His stories brought to national attention the possibility that aboveground nuclear tests may have caused cancer in people downwind from the Nevada test site.

Yet the law is useful when reporters deal with unfamiliar agencies. Pinpoint's Bob Mullins, for example, made a formal demand for investigative reports from the Nuclear Regulatory Agency on uranium diggings that were piling up along the southern Utah river. He found the weeks-long wait worthwhile. His report led to some corrective measures.

White thinks the Federal Privacy Act passed in 1974 and often thought of as a companion to FOIA, is less helpful than hindering. It gives people the right to inspect their files (except CIA and law enforcement documents). But in keeping records from unauthorized disclosure it sometimes prevents the press from poking into them, and that, after all, is what reporters are supposed to do.

The Freedom of Information Law is worth defending, despite its complexities, ambiguities, and even because some individuals who want to look at records are considered quite a nuisance by bureaucrats. Before the law went into effect, there was little law specifically opening up federal documents to inspection. In the absence of law, records were usually opened only at the pleasure of the agency. In a democracy, the public's business is supposed to be public except where there is an overriding, demonstrable need to protect records from release.

Mr. CAPENER. Thank you.

I appreciate the opportunity of appearing here this morning to tell you, Mr. Chairman, and members of your subcommittee that journalists outside of Washington, D.C., are regular users of the Freedom of Information Act. After over 4 years of listening to you, Mr. Chairman, on many different issues——

Senator HATCH. I know that has been an awful burden.

Mr. CAPENER. It is a burden that I am happy to have lifted.

Senator HATCH. That is an awful statement, but I accept it. I fully understand.

Mr. CAPENER. I am sure you take it in the spirit it was given.

However, after those 4 years, be they pleasant or whatever, I am looking forward today to having you listen to me on this issue which I consider very important not only to journalists but to all Americans, readers, listeners, and viewers who want and need to be told the truth about what is going on inside and outside of Government.

As you know and as has been stated here, I spent the last 9 years covering activities of the Utah congressional delegation and those of lawmakers from about a dozen other major regions of the country. At the first of this month, I was transferred back to Utah. During my short stay back in Salt Lake, I have talked with numerous newspaper reporters, TV and radio news directors and reporters, and lawyers who specialize in first amendment matters. I found there are at least three such lawyers in Salt Lake City.

I am here to report to you, Mr. Chairman, that the FOIA is a workable, often used, and important tool for Utah journalists. What was judged by Sigma Delta Chi as the best piece of public service television in the Nation last year was done by the news staff of KSL television. The story dealt with nursing home neglect and was called "Out of Sight, Out of Mind." Vital information in that documentary would not have been available without the Freedom of Information Act.

When reporters Ernie Ford and Brad White at our station learned of the death of a nursing home resident, a woman in her eighties who was left unattended while she was in a whirlpool bath and subsequently drowned, they asked for a copy of the investigation the State did on her death. That request was denied.

Federal medicare and medicaid regulations required the State to file a copy of its report on the death with the regional office of HEW in Denver. An FOIA request to that office resulted in our obtaining a copy of the report.

"Out of Sight, Out of Mind" not only resulted in KSL winning several national awards, but, more importantly, it brought about

major changes in the division of State government which regulates nursing home care.

Investigative reporters at both of Salt Lake City's newspapers have also effectively used the Freedom of Information Act to more adequately inform their readers and thus to serve the public good.

Gordon White, who heads the Washington News Bureau for the Deseret News received several major national awards for the work he did on the effects of radioactive fallout in southern Utah, fallout which resulted from nuclear testing on the Nevada desert in the late fifties and sixties.

Senator HATCH. If I could interrupt you at that point. This instance is very appropriate for you to bring up. As a result in part of Mr. White's excellent reporting, we have worked very hard for a couple of years now—actually more than a couple of years—to introduce, which I did this morning in interrupting these hearings, the radiation fallout bill.

In both the illustrations you have given, I am pleased to commend the reporters who were involved. Moreover, there are countless other illustrations of service performed by journalists throughout our country. We know you do a tremendous service.

I did not mean to interrupt you, except to make that point.

Mr. CAPENER. Thank you, Senator. I was going to refer to the fact that those news disclosures and other factors led at least in part to your series of hearings and the legislation you introduced today. We hope you are successful with that legislation. I could not have said that 2 weeks ago, but I can say it today.

Deseret News Reporters Bob Mullins and Dale Vanata did a series of stories on conditions at the Tooele Army Depot, a military installation important to the national defense. They used the FOIA to confirm salaries of guards, training requirements, and security at the base. Their stories brought about improved security at the western Utah base, higher pay for the guards, and an overall improved defense posture for the Army base, all a result of the FOIA request.

Many of the Nation's largest uranium mines are located in Utah, as you well know. Deseret News reporters obtained information from the Nuclear Regulatory Commission about waste and material dumped from some of those mines, information obtained as a result of FOIA requests.

They then prepared a series of stories dealing with radiation, fallout, and the tailings that had been piled on riverbanks, materials that to this date are still a threat to some citizens of the State of Utah.

Salt Lake Tribune Reporter, Bob Bryson, used the act to obtain FBI information on the fatal shooting of John Wesley Singer, the polygamist who refused to send his children to school. Bryson received 100 pages of information from the FBI. Forty-six of those pages were news clippings useless to Bryson. Nine pages had been edited under various existing FBI exemptions from Freedom of Information Act regulations.

However, Bryson said he did get some very useful information from the FBI. For example, he learned that the FBI investigation clearly showed that when he was shot and killed, Singer did have a loaded pistol pointed at officers who came to his home to arrest

him for not complying with State law. That information was very important to maintaining calm in the State. Incidentally, that information was improperly reported by at least one major national news organization.

As you know, the MX missile and how it might be based are of major importance to the people of Utah and thus to news media and the State. Therefore, Michael Goldfein, an investigative reporter at KU TV wanted to know if the State's major steel plant would actually benefit from the multiple protective shelter system for basing the missile, the system favored by the Air Force.

Goldfein used the FOIA to seek Air Force information on whether or not an agreement had actually been made, as rumored, with United States Steel's Geneva works to supply steel for constructing the missile shelters. Such an agreement could obviously mean jobs and stability for the long-threatened Utah steel plant.

However, Goldfein found that no such agreement exists. Thus, a potentially major selling point for constructing those massive shelters in Utah and Nevada was adequately squelched. The Air Force did say that United States Steel participated in the design of the missile shelters.

These are just a few of the ways the Freedom of Information Act has been used in your State of Utah and my State of Utah in recent months. The act is important not only here in the Nation's Capital but throughout the Nation for the free flow of information to the news media and thus to citizens of the United States.

Thank you very much.

Senator HATCH. Thank you.

I think both of your statements have been excellent. They both have touched on various aspects of great concern to professional journalists throughout America.

I do not think either of you are saying, or are you, that the Freedom of Information Act does not need some changes?

Mr. DORNFELD. Mr. Chairman, as our written statement indicates, we have some areas of concern where we would like to see the act strengthened from our standpoint in the area of time delays and in the area of fees, often excessive fees charged of journalists and others acting in the public interest.

For example, we had a reporter recently who was trying to simply arrange an interview with a regional SBA administrator. His underlings were trying to use the FOIA to charge him a fee for a simple interview with a bureaucrat.

Senator HATCH. I think maybe we can resolve that problem.

Mr. DORNFELD. Some of these problems cut both ways, Mr. Chairman. We acknowledge that there may be a few flaws with the present act. There may be some problems in the area of businesses and lawyers making use of the act for purposes other than for which it was intended.

Senator HATCH. Even those examples are not as much of concern to me as having leading law enforcement officers testify that most crimes in this country are resolved by informant testimony, and that since the passage of the Freedom of Information and Privacy Acts, informant testimony has dried up to the extent that experts claim only 25 to 50 percent of the number of informants previously aiding law enforcement in solution of certain types of crime are

now offering assistance. Regardless of the actual numbers, law enforcement personnel overwhelmingly agree that fewer informants are willing to risk cooperating with officers.

I think their testimony culminated in Stewart Knight's testimony. He is the head of the Secret Service. He testified back in 1979, while I was taking the testimony right here in this room, that there were at least two cities in this country that he recommended the President of the United States not visit to because the Service just did not have the intelligence ability as a result of the Freedom of Information and Privacy Acts to be able to protect him.

That was shocking to me and the rest of the country because his statement was of course disseminated by you professional journalists all over the country. That is a matter of concern to you as much as it is to me, I am sure.

Mr. DORNFELD. Mr. Chairman, we have serious doubts about whether the FOIA is really operating to discourage informant testimony. We have yet to hear the FBI come forward with a single case. Our position in the deliberations on the FOIA is to ask the intelligence agencies and ask the FBI to prove their case and to come forth with examples. We do not think they have examples. We do not think there has been a single case in which the CIA, for example, has lost an FOIA case or where they have had to appeal it. There is not a single case where they have been forced to disclose classified information.

Senator HATCH. I have not gotten to the CIA. I am just talking about general law enforcement. Despite extensive testimony from many varied witnesses, no one contested this general impression of difficulties created for law enforcement by FOIA.

Assuming that these top law enforcement officers were telling the truth, I am sure that would be of concern to you. That is all I am saying. It certainly is to me.

With regard to your assertion that the CIA has never had to appeal a FOIA case, I will direct counsel to add to this record any information relevant to that matter. That addition will be placed at the conclusion of my questioning.

Mr. DORNFELD. It would be of concern, Senator, but they talk about perceptions and they talk about informants getting perceptions about the act. I think that some of these perceptions are the result of the law enforcement agencies themselves clamoring about the effect of the law. Our position is that we suspect they just find the law annoying. They find journalists annoying. They find public scrutiny annoying.

Mr. CAPENER. They find politicians annoying.

Senator HATCH. I am sure they find some Members of Congress annoying, too.

Mr. DORNFELD. They would find it much easier to operate under a blanket of total secrecy. We had that kind of situation in this country before the passage of the FOIA and we had some serious abuses in the areas of domestic spying and illegal break-ins by the FBI and other abuses that came to light as a result of the FOIA. We believe the act has made those agencies more accountable and more responsive and it has been a public service.

Senator HATCH. Keep in mind that I have no doubt about that. I am not advocating a total repeal of the Freedom of Information

Act, but I am concerned that if we are reaching a position in our country where we are going to have terrorism and similar difficulties in foreign countries, particularly Europe, and if the Freedom of Information Act and Privacy Act are major contributors to our inability to prevent and punish crime at home and abroad, as has been articulated by representatives of almost every major law enforcement agency in this country, then I am concerned about getting to the bottom of the problem.

Maybe it is a matter of annoyance, but on the other hand, the testimony given in 1978 built a very impressive case. FBI Director Webster furnished legislators with a collection of about 125 actual illustrations with names deleted of recent refusals to provide information for FBI investigations by various persons, including a Federal judge, for fear of disclosure of the source's identity under the Freedom of Information and Privacy Acts.

Similar to the situation of foreign intelligence sources, in addition to the actual risk of disclosing the identities of law enforcement sources the perception or fear of possible disclosure could result and has resulted in an awful lot of silence. This has really put law enforcement and maybe even some of the top officers in this country in some sort of jeopardy.

Those are some of the balances we must consider. I share your sentiments that America ought to remain a free and open society. We ought to be able to have information available to journalists who often keep the Government straight, keep the bureaucrats on edge and thus encourage them serve the people better. I do not differ with you or Mr. Capener at all in that.

Let me ask just a couple of other questions.

Mr. DORNFELD. May I make one more point on that?

Senator HATCH. Yes.

Mr. DORNFELD. I think we are dealing with two things. We are dealing with perception and we are dealing with reality.

Senator HATCH. That may be.

Mr. DORNFELD. Director Webster talks about the perception. As a result, some potential informants say they are reluctant. However, the reality is that not a single FBI informant's name has been disclosed under the Freedom of Information Act in 15 years. That is the reality.

I think if the law enforcement agencies would stop trying to fan the flames and promote a partial repeal or total exemption under the act and instead deal with the reality, they could remedy a lot of their own problems.

Senator HATCH. Our commitment here is to check into that aspect as well. However, if they are right, I have to be concerned about the implications for our individual and collective security. If they are right, then even the perception alone is a major and serious problem in America.

You must realize as well the dilemma of the FBI. If they too vigorously argue of danger to informants, they are accused of exacerbating the perception problem. If they do not present a vigorous defense, they are faulted with failure to build an adequate case for changes in FOIA.

I know I would not trade the safety and security of American citizens unconditionally. Already some European allies are con-

cerned that our leniency in FOIA risks too much. If we can fine tune this act as you say, with a screwdriver rather than a crowbar and amend it so that it protects these interests, but still gives the maximum information for public information, I will be happy.

You stated that journalists make a small percentage of the total requests to Government agencies, although some estimates may be low. Can you tell us how much FOIA is used by journalists or what percentage of total FOIA requests are made by those serving the public interest, that is journalists, scholars, public interest groups, et cetera, if you have any idea?

Mr. DORNFELD. Senator, I am not aware that anyone has done an accurate compilation or even an estimate of that kind of a breakdown. However, one thing we would stress is that the mere presence of the act on the book serves to make information available to the public.

Oftentimes, merely by citing the Freedom of Information Act or threatening to file a request, a journalist gets the information that he or she needs. If some would contend that the relative use of the act by journalists is low in comparison to others, we would just say that from our standpoint the act has worked very well. In a lot of cases, it has prevented us from even having to make a formal request.

Senator HATCH. One of your arguments is that journalists need not even make FOIA requests because agencies voluntarily give the information rather than have to go through the pain and the expense of a formal request. That is not a bad argument really.

You have told us that many Government agencies avoid formal requests by providing requested material voluntarily. Agencies reason that under FOIA law, they will be required to disclose the information anyway.

S. 587 would extend the time limit—you have been somewhat critical about that—to answer FOIA requests, but would not remove the requirements to disclose information that is often requested. How then would extended time limits reduce the number of voluntary disclosures? Also, will not the agencies still try to avoid formal requests by voluntarily disclosing information they are required by law to disclose?

Mr. DORNFELD. Mr. Chairman, I think part of the problem is that the time limits in the law effectively operate as minimums. Very often agencies say they are unable to comply with those time limits. As a result, informal extensions are negotiated, or the agency simply refuses to comply and the requester therefore has to go along. As a result, the process gets strung out.

Our concern is that when you say the time limit is 10 days, it becomes 20. If you say it is 60, it becomes 6 months. That is the sort of situation we get into with a lot of agencies, particularly some of the law enforcement agencies. They are not adhering to the time limits in the present law. The only way of effectively dealing with that is to take them to court. Obviously that is happening in some cases.

Senator HATCH. You have heard the representative of the Department of Defense testify today. He has not been alone in his testimony that they are extremely concerned about groups, both foreign and domestic, which were antithetical to the best national

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security interests of this country utilizing the Freedom of Information Act for purposes which in many cases are damaging to the interests of the country.

There has been other evidence produced before this committee in the past, and I presume will be in the future, that certain organized crime syndicates and other criminals anxious to learn about informants and gain access to information that will help them defend themselves in court are also overutilizing the Freedom of Information and Privacy Acts.

Do you have any comments with regard to whether those concerns are justified, or whether they are simply outweighed by your desire to have the widest possible use of first amendment privilege?

Mr. DORNFELD. Mr. Chairman, our society would acknowledge that there may well be some problems in those areas. Our principal desire is to preserve the act in its present form for those who seek information for public purposes. There may be some additional fine tuning that is needed in the area of foreign interests seeking information or things along that line. Our principal concern is to preserve the act for those journalists, scholars, and others who seek the information for the public interest.

Senator HATCH. I appreciate that comment. That is what we are really trying to do. We are trying to fine tune a law that has an important purpose, a law that has efficacy but has prompted much criticism, some of it unjustified, but a great deal of it justified. Our legislative task is to sift the evidence and arrive at the very best possible conclusions in amendatory legislation.

You journalists, it seems to me, provide a great service to our society and to our Government. As we go through the evolutionary process of amending or revising the Freedom of Information Act and perhaps even the Privacy Act, we would appreciate it if you would give us whatever ideas you have concerning various amendments.

Mr. Capener, I personally want to compliment you for being here today and for telling us about some of the things that you and I know about as reported in the Utah media. I think we have some of the most aggressive and intelligent and effective investigative reporters in the country right there in that media, not the least of whom has been you.

Senator HATCH. I am very happy that you are now in an executive capacity because you have either overcovered me or undercovered me. However, we are happy to have you here and appreciate the testimony you have brought here today. I think it is a compliment to our State. Of course, I am sure it is a compliment to States everywhere and to professional journalists everywhere who are doing an honest, credible job of investigative reporting and disclosure.

Mr. CAPENER. Thank you very much.

Senator HATCH. Thank you both for being with us.

We may have some additional questions for all witnesses which we may submit to you because of our interests and your interests. If we do, we would appreciate your answering them as soon as you can.

[Additional material from the Department of Justice follows:]

United States Department of Justice
OFFICE OF INFORMATION LAW AND POLICY
WASHINGTON, D.C. 20530

December 11, 1981

Randall R. Rader, Esq.
General Counsel
Subcommittee on the Constitution
Senate Judiciary Committee
Washington, D.C. 20515

Dear Mr. Rader:

Pursuant to your request, my staff has compiled the following information regarding Freedom of Information Act cases in which agency classification determinations have been rejected by the courts:

1. Holy Spirit Ass'n v. Central Intelligence Agency, Civil No. 79-0151 (D.D.C.). On July 27, 1979, District Court Judge Gerhard Gesell ordered the CIA to disclose certain classified information pertaining to "Koreagate" matters. The D.C. Circuit affirmed this disclosure order in an opinion published at 636 F.2d 838, making this case the Government's first Exemption One loss at the appellate level. The Department of Justice is filing a petition for certiorari in the Supreme Court today.

2. Lamont v. Department of Justice, 475 F. Supp. 761 (S.D.N.Y. 1979), rev'd in part, No. 81-6078 (2d Cir., September 25, 1981). District Court Judge Edward Weinfeld ordered the FBI to disclose portions of two classified documents pertaining to FBI surveillance of the plaintiff and his associates during the 1950s. The Bureau determined that the information in one of the documents could be declassified and released. The Department of Justice appealed with regard to the other document and obtained a reversal from the Second Circuit.

3. Weberman v. National Security Agency, 490 F. Supp. 9 (S.D.N.Y. 1980), rev'd, 646 F.2d 563 (2d Cir. 1980), on remand, Civil No. 77-5058 (S.D.N.Y., June 5, 1981). This case involved a request for access to a document on a subject matter so sensitive that NSA could not even confirm or deny the existence of the document without harming the national security. District Court Judge Charles Brieant ordered NSA to confirm or deny the document's existence based upon his decision not to allow NSA to prove its entitlement to judgment in camera. After the Second Circuit reversed Judge Brieant on this procedural point, he examined a classified NSA affidavit in camera and immediately awarded NSA judgment on the merits.

4. Hamlin v. Kelley, Civil No. 76-C-3902 (N.D. Ill.). On May 21, 1980, District Court Judge Hubert Will ordered the FBI to disclose numerous classified documents pertaining

to FBI activities in the Chicago area. The Department of Justice moved for reconsideration and pursuaded Judge Will to allow an extensive in camera proceeding addressing the documents, which was held on October 15-16, 1980. On the basis of this in camera evidence, Judge Will reversed himself entirely and awarded judgment to the FBI on January 13, 1981.

5. Jaffee v. Central Intelligence Agency, et al., 516 F. Supp. 576 (D.D.C. 1981). On June 10, 1981, District Court Judge Barrington Parker found the FBI's classification determinations to be unpursuasive, so much so that he placed some of the classified information before him directly into his written opinion. Judge Parker has reserved judgment on the remaining classified information; the FBI has until December 14, 1981, to make further submissions in support of its classification determinations.

6. Pratt v. Webster, 508 F. Supp. 751 (D.D.C. 1981). On June 16, 1981, Judge Barrington Parker ordered the FBI to disclose classified material in two documents. On re-review, the FBI determined that the information could be released without harm and thus no appeal of that issue was taken.

7. Dunaway v. Webster, Civil No. 77-0907 (N.D. Cal., July 9, 1981). District Court Judge Robert Peckam rejected the FBI's classification determinations in this case, but sua sponte applied Exemption 7(C) to all of the information. Thus, while the decision stands as an adverse precedent, no appeal is likely.

8. Taylor v. Department of the Army, Civil No. 80-2353 (D.D.C., November 20, 1981). District Court Judge Harold Greene recently ruled against the Army on the issue of whether the "measured resource area ratings" for hundreds of army units (including troop stengths) can be properly classified and he ordered virtually immediate disclosure of such information. On December 2, Judge Greene granted a stay of his disclosure order, but only for five days. On December 7, the D.C. Circuit granted an emergency motion for a stay pending appeal (No. 81-2280).

For your convenience, I enclose a copy of the slip opinion in the Taylor case. Please do not hesitate to contact me if I can provide you with any further assistance in this matter.

Sincerely,

Daniel J. Metcalfe
Acting Director
Office of Information Law and Policy

Enclosure

Senator HATCH. Our next witness is Jonathan C. Rose, Deputy Assistant Attorney General in charge of the Office of Legal Policy.

Mr. Rose came to the Department of Justice from a private practice as a partner in the firm of Jones, Day, Reavis, and Pogue. Prior to his private practice, he served as Associate Deputy Attorney General and Deputy Assistant Attorney General for Antitrust.

Mr. Rose, we are happy to have you with us. We look forward to hearing from you.

STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY HON. CHARLES B. RENFREW, FORMER DEPUTY ATTORNEY GENERAL AND FEDERAL JUDGE

Mr. ROSE. Thank you very much, Mr. Chairman.

The former Deputy Attorney General and former Federal Judge Charles Renfrew has come back to Washington at great personal inconvenience to himself to join me at the doubleheader session that we face today. We have just been before the House Government Operations Subcommittee. I wonder if I might ask your permission to have him join me for the purpose of making his own views known to you.

Senator HATCH. I did not see you back there, Judge. We are delighted to welcome you once again to our committee. We have much respect for you and your viewpoints. We are just delighted to have you here.

Judge RENFREW. Thank you, Senator.

I received a telephone call when I was abroad from Mr. Rose, whom I got to know during the transition. He said that he had known that the Carter administration had done substantial review and analysis of the Freedom of Information Act. He asked if I would come back as a private citizen since I could no longer represent the Carter administration.

Senator HATCH. You have plenty of swat here in this committee, private citizen or otherwise. I think you have more as a private citizen, however, than you did working for President Carter.

Judge RENFREW. We have debated that before, sir.

Senator HATCH. I was just poking fun.

Judge RENFREW. The wounds are still fresh though.

Senator HATCH. We are looking forward to your serving again, but we hope it is under a Republican administration this next time.

Mr. Rose, I have a meeting with the new nominee to the Supreme Court at exactly 12. I have to leave here at exactly 5 to 12. Therefore, I would appreciate it if the remaining witnesses can summarize as shortly as they can. I would like to hear the rest of the testimony, but I will have to leave at 5 to 12.

If we are not finished, then I want to alert witnesses that I am going to have to have counsel take the final testimony. That meeting is a crucial meeting, at least I have been told by millions of conservatives all over the country that it is very crucial that I meet with her. As a supporter of Judge O'Connor, I do want to make that meeting.

If you could summarize, I would appreciate it. We will of course put your complete statements in the record following your oral

presentation. In addition, we will have questions that we will submit to you in writing.

Mr. ROSE. Mr. Chairman, I will try to rapidly summarize what is already a summary statement of our current position in the administration of conducting a review, as the Carter administration did, of current operational problems with the Freedom of Information Act.

Judge Renfrew can comment on the Carter administration study and his personal views, which are certainly in no way intended to represent those of the administration. However, on the other hand, I think we have had a fair amount of common ground and experience, mine much briefer and less extensive than his but still very similar experiences. I thought the perspectives of both of us would be helpful to your committee today.

Obviously, we would like to say that we have a strong support for the basic purpose and philosophy of the act to inform the public as fully as possible about the conduct of its Government in order to protect the effectiveness and integrity of the Government itself. We are not seeking perfection because the best is often the enemy of the good in any attempt to enact legislation, as you would know better than I.

I would like to briefly summarize the areas of current concern that have been expressed to us, that we are focusing on in our study, and that I know you are focusing on in this committee, and that your own bill addresses to some extent.

In the area of criminal law enforcement, it appears that the effectiveness of criminal law enforcement investigative agencies may well have been impaired, and also substantial administrative burdens may have been imposed on them by the Freedom of Information Act.

In summary, some of the application of the act may not be in the overall public interest. To give you some examples, the investigatory units within the Department of Justice yearly receive thousands of requests for law enforcement records. The FBI receives over 15,000 requests yearly and the Drug Enforcement Administration over 2,000.

The Drug Enforcement Administration estimates that 40 percent of its requests are from prisoners and another 20 percent are from individuals whom the DEA can identify as being connected with criminal drug activities.

Senator HATCH. How many connected with criminal drug activities? What percentage?

Mr. ROSE. They estimate 20 percent, sir.

Senator HATCH. That is a pretty hefty number.

Mr. ROSE. Yes, it is, sir.

Prisoner requests to the FBI constitute a lesser percentage of its requests, about 11 percent, but a greater absolute number, over 1,600 last year. Individuals connected with criminal activities have made extensive use of the FOIA to obtain investigatory records about themselves or to seek information about ongoing investigations, Government informants, or Government law enforcement techniques.

To comply with requests for investigatory information, investigatory files must be reviewed line by line to segregate exempt from

nonexempt information. The present exemption applicable to criminal investigatory files is narrowly drawn. The review and segregation process is time consuming and complex. It is often very difficult for an analyst to determine what information may have an adverse effect upon important law enforcement interests.

Requesters may be able to piece together in ways unknown to an FBI employee responding to an FOIA request segregated bits of information which are innocuous on their face but which can be used to identify the existence of a Government investigation or an informant.

It has been the Department's experience that some criminals, especially those involved in organized crime, have both the incentives and the resources to use the FOIA to such ends. Some have shown great persistence in using the act. The FBI, for example, has received 137 requests from one imprisoned felon who is reported to be an organized crime hitman.

Moreover, the experiences of the FBI and the DEA indicate that there is a widespread perception among confidential information sources that Federal investigators simply cannot fully guarantee the confidentiality of information because of FOIA. This perception apparently exists not only among individual street informants who have become increasingly aware of the existence of the Freedom of Information Act, but also among institutional information sources including local law enforcement agencies such as local police departments.

In the light of the complexity of the act and the obligation to release segregable information, this perception is difficult to dispel even in instances where we believe that the information offered by informants can clearly be protected by the act as it stands now. The FBI and the DEA have reported to us a number of incidents in which potential informants have specifically cited FOIA as their reasons for declining to cooperate with the Government.

Finally, it should be noted that the administration of the FOIA entails a significant commitment of limited resources of our criminal law enforcement investigative agencies. In 1980, the FBI employed a unit of approximately 300 full-time employees at a direct cost of about $11.5 million a year.

In conclusion of this particular point, it should be noted that only about 5 percent of all requests to the FBI are from media, scholars, or public interest research groups.

A second area of major concern to the administration is the impact of the FOIA on the national security agencies. Confidentiality is obviously of paramount importance to intelligence information sources whether they are individual sources or foreign governments.

However, the agency processing and judicial review requirements of the FOIA, along with the mandate to release reasonably segregable material which is not properly classified, makes it impossible in the judgment of the national security and intelligence agencies to offer the clear and certain guarantee of confidentiality which our national security intelligence agencies often require.

Our intelligence agencies can demonstrate that there is a belief among some important sources that the FOIA makes it impossible for our Government to adequately protect sensitive information

from disclosure. That belief, in their view, significantly impedes our intelligence activities abroad.

Moreover, the FOIA imposes upon intelligence agencies administrative burdens which can interfere substantially with their ability to carry out their primary functions. Within an agency such as the CIA, no single individual, or even any single unit, has access to a comprehensive cross section of files which would permit a complete and timely response to broad FOIA requests. Line personnel are forced to respond to FOIA requests while continuing to attempt to fulfill their regular duties.

Our intelligence agencies have no excess of trained intelligence agents and their time is of great value to the United States. The line-by-line review of FOIA requested documents seems a very questionable use of their time, particularly in light of the fact that very little ultimately can be released by these agencies.

Of course, there is nothing in the act to prevent its use by those whose interests are directly contrary to the national security. Mr. Phillip Agee, for example, has made extensive use of the FOIA in his personal crusade to undermine the CIA abroad. The response to one request from Mr. Agee for all CIA records containing mention of him cost the American taxpayers over $300,000. This is a Government expense which many citizens and Members of Congress might justifiably question, particularly in a time of severe budgetary constraint. However, under existing law, the CIA had no choice but to expend the money.

A third area of concern is the abuse of the FOIA as a litigation discovery device. In light of the limit of time, I think I will just simply remit that to my written statement.

A fourth area which we believe requires the attention of this committee is the use of FOIA by commercial interests to obtain confidential business information which has been submitted by businesses to Government. It is apparent that commercial interests have made great use of the FOIA to obtain such information.

For example, over 85 percent of the FOIA requests to the Food and Drug Administration, which received over 33,000 requests last year, are from regulated food and drug industries or their representatives seeking information related to their competitors. While it is unclear what damage may have been done to business submitters by FOIA releases, there is at least a perception in parts of the business community that commercially valuable information submitted to the Government is vulnerable to release by FOIA.

This perception is reinforced by the absence of any adequate procedural means of asserting their legitimate interests either before the agencies or in court to protect the information. As a result, there is evidence that the quality of information received from the business community by Government agencies has deteriorated.

Providing greater assurances that confidential business information will not be disclosed via FOIA would seem to be in the clear interests not only of the submitters but also the Government agencies which depend upon a free flow of information from private enterprises.

Finally, we believe it is important that the Congress review the costs of compliance with the FOIA. During the 1974 debates, I

believe the basic estimates of compliance costs were between $40,000 and $100,000. Our recent figures in 1979 indicated that the compliance costs throughout the Government were at least $47.8 million. Indeed, the actual costs including all of the costs are probably far greater than that.

The problems I have outlined are the primary areas of concern for the administration. The act presents of course a number of other problems which I have not discussed today and which could usefully be addressed by legislation. We expect that our legislation proposals will address some of these, including the difficulties of complying with the current time limits under the act. The lengthening processing backlogs existing in some agencies, which are sometimes over a year, obviously render the act virtually useless for requesters who need a timely response, such as current events media, on whom the public relies primarily for their information.

We are interested in exploring ways not only to relieve the problems which have arisen from the operations of the act, but also to make the act a more useful and timely public information device.

In this regard, I might also note that the Congress may wish to reconsider its own complete exclusion from the act. Nothing in our view of the act to date has convinced us of the wisdom or the necessity for the complete and total congressional exclusion. Certainly no body of government has more to do with how key decisions are made affecting our citizenry. However, we of course recognize that this is an issue which is one ultimately for the Congress itself to assess and resolve.

We wish to stress again that the administration is fully committed to the purposes and philosophy of the Freedom of Information Act. An informed electorate is the best guarantee of a good and effective government. However, ultimately the end we seek through this act, as in the case of any other law, is good government in the public's interest and not the disruption of essential government functions or the waste of government resources to serve only private interests.

As the original sponsors of the act fully recognized, the public's right to know must be balanced against a citizen's right in certain circumstances to communicate confidentially with his government. Furthermore, the public is entitled to an effective government. Such a government cannot in all cases be an entirely open government.

We believe that with the benefit of the experience which we have now acquired in administering this statute, such abuses can be prevented while the act is at the same time made a more effective and useful vehicle for public communication. We look forward to working with the committee in this common effort.

With your permission, Mr. Chairman, I would now like to ask Judge Renfrew if he has some things to add, as I am sure he does, to the comments that I have made.

Senator HATCH. Judge, let me just highlight a couple of points of his testimony and then turn to you.

I was interested in your comment that by contrast only about 5 percent of the requests to the FBI and DEA are from the media, scholars, and public interests groups. That was an interesting

thing. I have a great interest in keeping access in those groups. I think it is important. On the other hand, the law enforcement people are going to have to make out a very good case before we interfere with any access by those groups, or at least greatly interfere.

I was also interested in your statement that "Mr. Phillip Agee, for example, has made extensive use of FOIA in his personal crusade to undermine the CIA abroad. The response to one request alone from Mr. Agee for all CIA records containing mention of him cost the American taxpayers over $300,000. That is a Government expense which many citizens and Members of Congress might justifiably question, particularly in a time of severe budgetary constraints. However, under existing law, the CIA had no choice but to expend the money."

Those are just two emotional points that I think you made, but they are nevertheless very serious points. On the other hand, I do not think you are saying that even though we might find somebody reprehensible who is an American citizen we should bar him from access to records pertaining to him if it is important to his best interests to defend himself or otherwise protect his passport or to protect himself from other oppressiveness on the part of Government. You are not saying that?

Mr. ROSE. No, sir.

Senator HATCH. However, you are saying in this man's case, which is a pretty well-documented case, that it is a pretty reprehensible thing to charge taxpayers $300,000 just to provide him with every mention of him in the records.

Mr. ROSE. It seems clear, sir, to us that the purpose was not to protect himself, but rather use it for another purpose which is pretty clearly on the public record.

Senator HATCH. Your statement is duly noted. I have not read it all yet, but I will read it and finish it.

Judge Renfrew, as I have said, we are just delighted to have you here again. I think everybody on the Judiciary Committee has a deep and abiding respect for you. We will be happy to hear what you have to say.

Judge RENFREW. I would like to start with an apology because I simply do not have any prepared testimony. As I said, Mr. Rose called me when I was abroad.

Senator HATCH. We would be happy to have you submit anything you would like to.

Judge RENFREW. What I would like to do is just share my thoughts rather than go back and submit something in writing. However, I do have something I would like to have made part of the record.

When Mr. Rose called me, he asked if I would be willing to come back to share my perspective. I am delighted to do so. I obviously cannot speak for the Carter administration. There is no Carter administration. I also do not wish my appearance here, side-by-side with Mr. Rose, to suggest that I am going to endorse in whole or in part whatever the administration may come up with with respect to their amendments to the Freedom of Information Act.

Senator HATCH. We understand.

Judge RENFREW. I feel strongly about the Freedom of Information Act. I think that is really the bedrock of open government in this country. I heard you talking with the previous witnesses about using a screwdriver rather than a crowbar. If I might suggest, I would prefer a microscope and a scalpel.

Senator HATCH. We can use those instruments, too.

Judge RENFREW. I think what I would like to suggest and have made part of this record in lieu of any prepared statement by me is the work that we in the Department of Justice had undergone in the Carter administration that is contained in the letter from Attorney General Civiletti to Mr. McIntyre of December 18, which sets forth some proposed amendments that we had to the Freedom of Information Act and some supporting memoranda.

As we all know, I think the science of democratic government is a continuing experiment. The Freedom of Information Act, as well as many other important statutes which bear such noble purposes, should be continually evaluated and reviewed to see whether they have fulfilled the purposes for which they were designed.

I think it is time, as we thought in the Carter administration, to look at that act. We had a number of what we thought were modest proposals to conform to existing case authority construing the act and also to conform to some reality.

I would like very much, Mr. Chairman, if that memorandum, letter, and proposed amendments could be made part of this record for the consideration of this committee if you decide to do so.

Senator HATCH. We would love to do that.

Judge RENFREW. As I say, there were a number of areas that were addressed that the administration was interested in: Time limits, what is reasonably segregable, maintaining the confidentiality of business information, the impact on law enforcement and foreign intelligence, the use of the act in lieu of following discover procedures. They are all addressed in that underlying memorandum.

I might close with one personal example of the type of thing where the act was used where I think Congress had not intended that it be used.

During my tenure as Deputy, we had received a request under the Freedom of Information Act for the declination policies of all U.S. attorneys. These policies would set forth in specific detail what quantity of contraband, if apprehended, would form the basis of a prosecution and which lesser amount might not and would not be the subject of a prosecution.

I felt and overruled the Criminal Division at the time that Congress had not intended to give drug traffickers a blueprint of what quantities of drugs to bring into this country to evade prosecution. Yet through misconstruction, in my judgment, and misunderstanding of the congressional purpose and the use of the act, some people thought such information should have been turned over.

I think that all of us are interested in seeing that the act fulfill the purpose for which it was intended. As we know, we have to strike balances for some of the overlapping interests that it intends to serve.

Last night, I read a series of articles. A friend of mine at the Washington Post sent them to me about his concern about possible

amendments and dealing with his perceptions about what might be done. Some of the prior witnesses were talking about the problem of perceptions.

I think perceptions can be reality, but I would hope that this committee, in looking at amendments, would look at them very carefully and keep in mind the overall purpose that act is designed to fulfill and its interest in our society and put the witnesses to the test to give you data and information to justify their requests. The burden should be on those seeking to amend it.

Senator HATCH. We are very happy to have had you take the time to come here. We recognize you as an acknowledged expert, along with Mr. Rose, in this area.

Without objection, we will put the Civiletti memorandum into the record at this point.

All kidding aside, we acknowledge that under the prior administration there has been some very careful looking at this legislation. We commend them for it and commend you and Mr. Rose in particular.

Thank you so much for being with us. It was good to see you again.

We will submit questions to you, Mr. Rose, in the interests of time. They will be extensive.

Mr. ROSE. Thank you very much, sir.

[The prepared statement of Mr. Rose and Mr. Civiletti memorandum follows:]

Prepared Statement of Jonathan C. Rose

Mr. Chairman and Members of the Committee:

With your permission, I will submit my written statement for the record, and give a somewhat shorter version orally for the purposes of this hearing. I am pleased to appear before you today to explain the views of the Department of Justice concerning the need for amendment of the Freedom of Information Act (FOIA). With me here today is the Honorable Charles B. Renfrew, who served as Deputy Attorney General in the Carter Administration, and thus needs no introduction to most of you. He has graciously agreed to to give the benefit of his experience working with the Act during the last administration.

The need for revision of the FOIA has been under active study by the Department since December of 1978. Judge Renfrew can comment more specifically on the review of the Act and the proposals developed by the Justice Department during the Carter Administration. At the request of the present Attorney General, the Department of Justice recently solicited comments from all government agencies on the operation of FOIA and requested suggestions on how the Act could be improved. The Department is in the process of analyzing the comments as they are received and drafting possible amendments based on these comments and on the extensive work which was done on this matter by the previous administration.

The Department of Justice does not, at this time, have any specific amendments to propose, nor does it wish to comment

specifically on any of the FOIA amendments which are currently before Congress and this committee. The Department intends to present to Congress a comprehensive package of Administration amendments to the Act within the next two months. I hope this testimony will be accepted in the spirit in which it is offered--an effort to cooperate with this Committee in its review of the FOIA.

I should say, before I continue further, that the Administration comes to this task of reviewing the operation of the Act fully appreciative of the many hours devoted to this subject by this subcommittee, its predecessors, the other House of Congress and many prior administrations. We wish to stress our strong support for the basic purpose and philosophy of the Act: to inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. We are also fully aware of the maxim that the best is often the enemy of the good in government. Thus, the Administration is not seeking perfection in the operation of the FOIA. However, it seems clear that there are significant problems with implementation of some of the provisions of FOIA which urgently require legislative attention.

I would like to summarize briefly what appear from our study to this point to be the problems with the current Act which appear to be of greatest government-wide concern and most clearly in need of a legislative review. These problems are discussed more fully in my written statement.

First, there appears reason to believe that the current requirements imposed by the Act on criminal law enforcement agencies may well have impaired the investigatory abilities of those agencies, imposed very substantial administrative burdens, and may, in sum, clearly not be in the overall public interest.

For example, the investigatory units within the Department of Justice yearly receive thousands of requests for law enforcement records. The FBI receives over 15,000 requests yearly and the DEA over 2,000. The DEA estimates that 40% of its requests are from prisoners and another 20% are from individuals whom the DEA can identify to be connected with criminal drug activities. Prisoner requests to the FBI constitute a lesser percentage of requests (about 11%) but a greater absolute number (over 1,600 last year). Individuals connected with criminal activities have made extensive use of FOIA to obtain investigatory records about themselves or to seek information concerning on-going investigations, government informants, or government law enforcement techniques.

To comply with requests for investigatory information, investigatory files must be reviewed line-by-line to segregate exempt from non-exempt information. The present exemption applicable to criminal investigatory files is narrowly drawn and the review and segregation process is time-consuming and complex. It is often very difficult for an analyst to determine what information may have an

adverse effect on important law enforcement interests. Requesters may be able to piece together (in ways unknown to the FBI employee responding to an FOIA request) segregated bits of information which appear innocuous on their face but which can be used to identify the existence of a government investigation or an informant. It has been the Department's experience that some criminals, especially those involved in organized crime, have both the incentive and the resources to use FOIA to such ends. Some have shown great persistence in using the Act. The FBI, for instance, has received 137 requests from one imprisoned felon, who is reported to be an organized crime "hit man."

Moreover, experiences of the FBI and DEA indicate that there is a widespread perception among confidential information sources that federal investigators cannot fully guarantee the confidentiality of information because of FOIA. This perception apparently exists not only among individual "street" informants, who have become increasingly aware of the existence of FOIA, but also among institutional information sources, including local law enforcement agencies. In light of the complexity of the Act and the obligation to release segregable information, this perception is difficult to dispel even in instances where we believe that the information offered by informants can clearly be protected by the Act as it stands. The FBI and the DEA have reported to us a number of incidents in which potential informants have specifically cited FOIA as their reason for declining to cooperate with the government.

It should be noted, finally, that the administration of FOIA entails a significant commitment of the limited resources of our criminal law investigatory agencies. In 1980, the FBI employed a unit of approximately 300 full-time employees at a direct cost of about $11.5 million.

When viewed in light of the substantial use of the Act which is made by prisoners or individuals connected with criminal activity and its interference with law enforcement, one must wonder whether the public is indeed benefitting from these expenditures. It should be noted that only about 5 percent of all the requests to the FBI and DEA are from the media, scholars, or public interest research groups.

II.

A second area of major concern to the Administration is the impact of FOIA on national security agencies. Confidentiality is obviously of paramount importance to intelligence information sources, whether they are individual sources or foreign governments. But the agency processing and judicial review requirements of FOIA, along with the mandate to release "reasonably segregable" material which is not properly classified, make it impossible in the judgment of the national security and intelligence agencies to offer the clear and certain guarantee of confidentiality which national security intelligence often requires. Our intelligence agencies can demonstrate that there is a belief among some important foreign sources that FOIA makes

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it impossible for our government to adequately protect sensitive information from disclosure. That belief in their view significantly impedes our intelligence activities abroad.

Moreover, FOIA imposes upon the intelligence agencies administrative burdens which can interfere substantially with their ability to carry out their primary functions. Within an agency such as the CIA, no single individual or even any single unit has access to a comprehensive cross-section of files which would permit a complete and timely response to broad FOIA requests. Line personnel are forced to respond to FOIA requests while continuing to attempt to fulfill their regular duties. Our intelligence agencies have no excess of trained intelligence agents, and their time is of great value to the United States. The line-by-line review of documents requested under FOIA seems a very questionable use of their time, particularly in light of the fact that, even though a great deal of material must be reviewed, very little can ultimately be released by intelligence agencies.

There is, of course, nothing in the Act to prevent its use by those whose interests are directly contrary to the national security. Mr. Phillip Agee, for example, has made extensive use of FOIA in his personal crusade to undermine the CIA abroad. The response to one request from Mr. Agee for all CIA records containing mention of him cost the American taxpayers over $300,000. That is a government expense which many citizens and members of Congress might justifiably question, particularly in a time of severe budgetary constraints. However, under existing law, CIA had no choice but to expend the money.

III.

The use of FOIA as a litigation discovery device presents a third area of great concern to the Administration. It is common practice for parties in litigation with the United States, or for that matter parties engaged in private litigation, to request information under the Act, even where they have compulsory process available under the rules of civil or criminal procedure or under agency regulations. Such requests are often nothing more than attempts to circumvent the limitations of relevance and need imposed by applicable discovery rules, or, simply to harass the government. A requester/litigant can, through FOIA, impose burdensome document production requirements which are, for good reason, impermissible under the applicable discovery rules.

It is often necessary for the government attorneys responsible for a government litigation to take time from their case preparation to review documents in response to an FOIA request from an opposing litigant. There is considerable evidence that many in the private bar are aware of the potential for disruption and delay of litigation afforded by FOIA and deliberately use the Act to harass a prosecuting agency.

We do not believe that Congress intended FOIA to be so used as a means of disrupting law enforcement or avoiding the rules of discovery in judicial or administrative proceedings.

IV.

A fourth area which we believe requires the attention of this Committee is use of FOIA by commercial interests to obtain confidential business information which has been submitted by

businesses to the government. It is apparent that commercial interests have made great use of FOIA to obtain such information. For instance, over 85% of the FOIA requests to the Food and Drug Administration, which received over 33,000 FOIA requests last year, are from the regulated food and drug industries, or their representatives seeking information relating to its competitors.

While it is unclear what damage may have been done to business submitters by FOIA releases, there is at least a perception in parts of the business community that commercially valuable information submitted to the government is vulnerable to release under FOIA. This perception is reinforced by the absence of any adequate procedural means of asserting their legitimate interests either before the agency or in court. As a result, there is evidence that the quality of information received from the business community has deteriorated.

Providing greater assurances that confidential business information will not be disclosed via FOIA would seem to be in the clear interest not only of the submitters but of the government agencies which depend on a free flow of information from private enterprises.

V.

Finally, we believe that it is important that Congress re-examine the costs of complying with FOIA. Congress clearly did not contemplate that FOIA implementation would be as expensive as it has become. During the deliberations over 1974 amendments, Congress estimated annual government-wide costs resulting from these amendments would be between $40,000 and $100,000.

A Justice Department survey estimated the direct cost of FOIA compliance in 1979 at $47.8 million. A more recent survey by the Department's Office of Information Law and Policy indicated that 1980 direct costs were approximately $57 million. We believe that as large as these figures are, they still greatly understate the real costs of FOIA to the taxpayer. In particular these estimates do not quantify the indirect lost "opportunity costs" or the costs of the disruption of agency business caused by FOIA.

Separate from the question of total cost is the question of who is paying for FOIA. At present, it appears that agencies collect, through fees charged to the requester, only about 4 percent of the direct cost of responding to FOIA requests. We believe it is important to re-examine the fee collection authority under FOIA in light of the considerable cost of FOIA compliance and the extensive use which has been made of the Act by private, commercial interests. There appears to be no good reason why those who are using the Act to serve private commercial and financial interests should not be required to pay the full costs of FOIA processing and, when appropriate, the fair market price for commercially valuable information. The failure to do so not only results in the unnecessary expenditure of considerable taxpayer money to serve the narrow interest of private requesters, but also tends to encourage frivolous or unnecessarily broad requests.

Conclusion

The problems outlined above constitute the primary areas of concern for the Administration. The Act presents, of course, a

number of other problems which I have not discussed today and which can be usefully addressed by legislation. We expect that our legislative proposals will address some of these, including the difficulties of complying with the current time limits in the Act. The lengthy processing backlogs existing in some agencies (which sometimes are over a year) obviously render the Act virtually useless for requesters who need a timely response, such as the current events media on whom the public relies primarily for its information. We are interested in exploring ways not only to relieve the problems which have arisen from the Act, but also to make the Act a more useful and timely public information device.

In this regard, I would note also that Congress may wish to reconsider its own complete exclusion from the Act. Nothing in our review of the Act to date has convinced us of the wisdom or necessity for this complete and total Congressional exclusion. Certainly no body of the federal government has more to do with how key decisions affecting our citizens are made. However, we of course recognize that this issue is one for the Congress itself to assess and resolve.

We wish to stress again that the Administration is fully committed to the purposes and philosophy of the Freedom of Information Act. An informed electorate is the best guarantee of a good and effective government. But ultimately the end we seek through this Act as in the case of any other law is good government in the public's interest and not the disruption of essential government functions or the waste of government resources to serve only private interests. As the original

sponsors of the Act fully recognized, the public's right to know must be balanced against a citizen's right in certain circumstances to communicate confidentially with his government. Furthermore, the public is entitled to an effective government and such a government can't in all cases be an entirely open government. We believe that, with the benefit of the experience which we have now acquired in administering this statute, such abuses can be prevented while the Act is, at the same time, made a more effective and useful vehicle for public communication. We look forward to working with the Committee in this common effort.

Office of the Attorney General
Washington, D. C. 20530

December 18, 1980

Honorable James T. McIntyre, Jr.
Director, Office of Management
and Budget
Executive Office Building
Washington, D.C. 20530

Dear Mr. McIntyre:

I am sending you herewith proposed amendments to the Freedom of Information Act together with supporting memoranda analyzing and evaluating each of the proposed amendments. These proposals represent our best view, based on three years of study, of the changes that are necessary in the Act. I am sending them to you at this time for your consideration and review.

I intend to convey a copy of these documents to the incoming Attorney General so that he may review and analyze them and, if he sees fit, prepare a legislative proposal for transmission to your successor for his consideration and such action as he may deem appropriate.

Sincerely,

Benjamin R. Civiletti
Attorney General

BE IT ENACTED BY the Senate and House of Representatives of the United States in Congress assembled,

Sec. 2, 5 U.S.C. §552(a)(6) is amended to read as follows:

(A) Each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection which are sufficiently identified to permit the records to be retrieved from an agency's files promptly, and which are not so voluminous as to require an extensive file search shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) Each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection, which are not sufficiently identified to permit their prompt retrieval or are so voluminous as to require an extensive file search, shall, within thirty working days after the receipt of any such request --

(i) determine whether to comply with such request, in whole or in part, and shall immediately notify the requester of such determination and the reasons therefor, and of the requester's right to appeal to the head of the agency any adverse determination; or

(ii) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed one year.

(C) Each agency shall, within thirty working days after the receipt of an administrative appeal --

(i) make a determination on such appeal; or

(ii) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed six months. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(D) Each agency shall, within days of the effective date of this Act, promulgate regulations setting forth the bases for establishing all time periods under paragraphs (6) (B) (ii) and (6) (C) (ii) of this subsection, said regulations to take into account all relevant factors, including but not limited to:--

(i) the volume of requests and appeals received by the agency;

(ii) the resources available to the agency for the processing of such requests and appeals;

(iii) the volume of records required to be searched to locate all records responsive to the request or appeal;

(iv) the volume of responsive records required to be reviewed for release pursuant to the request or appeal;

(v) the need to search for and/or review records maintained in field facilities or other establishments that are separate from the agency office processing the request or appeal;

(vi) the character of the responsive records;

(vii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein; and

(viii) the need for the solicitation of the views of private submitters of information concerning the disclosure of responsive records containing such information.

(E) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his or her administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the requester. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

Sec. 3. 5 U.S.C. § 552(b) is amended by adding at the end thereof the following:

In determining which portions of records are reasonably segregable, the following may be considered: any public interest in the release of such portions; their intelligibility or other value to the requester; the degree to which such portions are readily severable from the balance of the records and any significant costs in making such severed portions available; whether the information in such portions is otherwise available to the requester from other scurces, including libraries, which are identified or listed for the requester by the agency in its response to the request; and the degree of risk that there may be persons who have such significant information or expertise on the subject of the record as to render deletion of only matter that the agency can prove to be exempt ineffective to protect exempt information which may be derived from such record.

Sec. 4(a). 5 U.S.C. § 552(a)(4)(B) is amended by adding at the end thereof the following:

Actions under Chapter 7 of this title to enjoin the disclosure of agency records shall be brought in the district court of the United States in the District of Columbia, or in the district where the records are situated or where the plaintiff has principal residence or place of business, but the court, upon motion of the agency or of any person seeking substantially the same records or upon its own motion, may make any order respecting the

transfer of the action and its consolidation with any other action involving access to substantially the same records, including actions under this section, as the interests of justice require, but such order shall be framed with due regard for rights to sue, intervene, implead or interplead. The court shall review the decision to disclose such records pursuant to the provisions of 5 U.S.C. § 706 (2)(A).

(b) 5 U.S.C. § 552(b)(4) is amended to read as follows:

trade secrets and commercial or financial information obtained from any person and privileged or confidential, where release would impair the legitimate private competitive, financial or business interests of any person, but nothing in this exemption shall be construed to authorize the withholding of the prices agreed to in any awarded public contract, or any of the other basic terms and conditions of such a contract, except as such a contract may provide for a license to or access by an agency to trade secrets or other information covered by this exemption in order economically to achieve the purposes of such contract; Provided, that in case of a good faith claim by a submitter of information, made in accordance with agency regulations, that any such information is subject to this exemption, the agency shall expeditiously notify the submitter of the receipt of any request under this section for access to such information, and of the possibility that such request could be granted, whereupon the submitter may support such a claim, unless the agency determines, prior to giving notice, that the request for access should be denied in its entirety, and should the agency thereafter determine to grant such request in whole or in part, the agency shall notify the submitter of that determination not less than ten working days prior to disclosing any such records; and Provided, further, that discretion may be exercised to disclose records subject to this exemption over the objection of the submitter only upon the agency's written determination that such disclosure would substantially benefit the health, safety, or welfare of the general public;

(c). 5 U.S.C. § 552(a)(4) is amended by adding at the end thereof the following:

> (H) Determinations made under subsection (a)(6) of this section by the head of an agency or by a duly authorized agency official shall be made without regard to, and shall be deemed authorized within the meaning of, Section 1905 of Title 18 of the United States Code.

(d). 18 U.S.C. § 1905 is amended by adding at the end thereof the following:

> It shall not be a violation of this section if it is determined in writing by the head of an agency or a duly authorized agency official that the disclosure of information would --
>
> (a) be necessary or appropriate to the accomplishment of an authorized agency mission; or
>
> (b) substantially benefit the health, safety, or welfare of the general public.

Sec. 5(a). 5 U.S.C. § 552(b)(2) is amended by adding at the end thereof a comma and the following:

including manuals and instructions to investigators, inspectors, auditors or negotiators, guidelines for the allocation of prosecutorial resources, and examination material used solely to determine individual qualifications for employment, promotion, or licensing, the disclosure of which would jeopardize law enforcement, negotiations, or examinations, and further including reports describing the vulnerabilities to criminal interference of facilities or activities of government or of persons engaged in interstate or foreign commerce;

(b). 5 U.S.C. § 552 is amended by inserting the following new subsection (c) and renumbering accordingly:

(c) This section shall not require the disclosure of organized crime, terrorism or foreign counterintelligence investigatory records compiled by a criminal law enforcement authority for law enforcement purposes until five years after termination of such an investigation without prosecution, or until five years after prosecution, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exemption, but no such records shall be destroyed or otherwise disposed of for a period of five years after the end of such period, any statute or administrative action to the contrary notwithstanding. This section shall not require the disclosure of other investigatory records compiled by a criminal law enforcement authority for law enforcement purposes until three years after termination of such an investigation without prosecution, or until three years after prosecution, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in disclosure, but no such records shall be destroyed or otherwise disposed of until at least three years after the end of such period, any statute or administrative action to the contrary notwithstanding.

(c). 5 U.S.C. § 552 is amended by inserting the following new subsection (d) after new subsection (c) and renumbering accordingly:

(d) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.

(d). 5 U.S.C. § 552(b)(7)(D) is amended as follows:

(1) strike the words "disclose the identity of a confidential source" and insert in lieu thereof the following:

tend to disclose the identity of a confidential source, including a state, local or foreign government which furnished information on a confidential basis.

(2) strike the word "only."

(e). 5 U.S.C. § 552(b)(7)(F) is amended as follows:

strike the words "law enforcement personnel" and insert in lieu thereof "any natural person."

(f). 5 U.S.C. § 552(a)(3) is amended by adding at the end thereof the following:

The Attorney General, in accordance with public rule making procedures set forth in Section 553 of this title, may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under Section 552a of this title shall be made available to requesters who are persons imprisoned under sentence for a felony under federal or state law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (a) appropriate in the interests of law enforcement, of foreign relations and national defense, or of the efficient administration of this section, and (b) not in substantial derogation of the public information purposes of this section.

(g). 5 U.S.C. § 552 is amended by adding at the end thereof the following:

(h) For the purposes of this section --

(1) the term "foreign counterintelligence" means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons;

(2) the term "terrorism" means any activity that involves a violent act that is dangerous to human life or risks serious bodily harm or that involves aggravated property destruction, for the purposes of --

(A) intimidating or coercing the civil population or any segment thereof;

(B) influencing or retaliating against the policies or actions of the Government of the United States or of any State or political subdivision thereof or of any foreign state, by intimidation or coercion; or

(C) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce, by intimidation or coercion;

(3) the term "organized crime" means those self-perpetuating, structured and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect their activities through a pattern of graft or corruption, and whose association includes one or more of the following characteristics:

A. their illegal activities are conspiratorial;

B. in at least part of their activities, they commit or threaten to commit acts of violence or other acts which are likely to intimidate;

C. they conduct their activities in a methodical or systematic and in a secret fashion;

D. they insulate their leadership from direct involvement in illegal activities by their organizational structure;

E. they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means; and

F. they engage in patently illegal enterprises such as dealing in drugs, gambling, loan-sharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.

Sec. 6. 5 U.S.C. § 552(b) is amended by deleting the word "or" between subsections (8) and (9), by substituting a semicolon for the period at the conclusion of subsection (9), and by adding at the end thereof the following new subsection:

(10) information certified by the Director of Central Intelligence or a designee to be (A) intelligence obtained from a person, entity or organization other than a person employed by the United States Government, (B) information that identifies or tends to identify a source or anticipated source of information or assistance to an intelligence agency, or (C) information concerning the design, function, deployment, exploitation or utilization of scientific or technical systems for the collection of intelligence, but not including any research programs which involve experimentation with or risk to the health or safety of human beings; provided, that in each such instance the certification shall be conclusive and not subject to any judicial review; that this certification may not apply to information responsive to requests by U.S. citizens or permanent resident aliens for information concerning themselves; and that, in the case of information in the files of the Federal Bureau of Investigation, the certification shall be made by the Director of the FBI or a designee;

Sec. 7(a). 5 U.S.C. §552(b) is amended by adding at the end thereof the following two new subsections:

(11) records the disclosure of which would interfere with a pending or anticipated civil or criminal proceeding, including the settlement thereof, in which the United States is a party or has a substantial interest; or

(12) records generated by any party to a legal action with the United States in connection with the settlement of that action.

(b). The second sentence of 5 U.S.C. §552(a)(4)(B) is amended to read as follows:

In such case the court shall determine the matter de novo, and may examine the contents of such agency records, or a representative sample thereof, in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, or may employ such other procedures as it deems warranted in the circumstances of the case, including consideration of affidavits, either in camera or on the open record, describing records by appropriate categories, and the burden is on the agency to sustain its action.

Sec. 8. 5 U.S.C. § 552(a)(4)(B) is amended by adding at the end thereof the following:

> In any case under this section, where the complainant has made a prima facie showing that requested records exist that are not in the possession of the agency, the court may (i) join as a party, by order which may be served in such manner and in such places as the court may direct, any person or entity that has possession of the requested records, (ii) upon finding that the records were improperly removed or withheld from the agency and that the agency does not have complete copies of such records, order such person or entity to return the records or copies thereof to the agency for a determination of the complainant's request, and (iii) retain jurisdiction of the action to order the agency to produce any agency records that may be improperly withheld from the complainant.

FREEDOM OF INFORMATION ACT AMENDMENTS

SECTION-BY-SECTION ANALYSIS

Sec. 2. Time Limits

The section would make the following changes in the time limits provisions of the Freedom of Information Act:

1. Specify that the time allowed for responses to requests for records which are sufficiently identified as not to require extensive file searches be 10 working days; and extend the time allowed for all other initial request responses and determinations of administrative appeals from 10 to 30 working days.

2. Provide an alternative course, subject to agency regulation, that would allow for an expanded review period of up to 1 year for requests and up to 6 months for administrative appeals, with notice to the requester within the initial 30-day period of the reason(s) why more time is required and an estimate of when the determination will be completed.

3. Allow agencies to promulgate regulations that would govern the circumstances under which such additional time for fully responding to a request or deciding an administrative appeal would be invoked, taking into consideration the following factors:

a) the volume of requests and appeals handled by the agency;

b) the agency resources available for the processing of FOIA requests and appeals;

c) the volume of records which must be searched to locate all records responsive to the request or appeal;

d) the volume of records located which must be reviewed for release;

e) the need to locate and/or review records maintained in separate facilities;

f) the character of the responsive records;

g) the need for consultation with another interested agency; and

h) the need for contacting private submitters of information concerning the disclosure of records containing such information.

Sec. 3. Reasonably Segregable

The section provides five factors to be included in the statute which may be considered in determining whether portions of a record are reasonably segregable:

1. any public interest which may exist in the release of such portions;

2. the intelligibility of the portions after exempt material has been deleted, or any other value they may have to the requester;

3. the ease of segregability of such portions and the costs involved in making them available;

4. the availability of such information from public sources, which may be listed for the requester by the agency in its response; and

5. the risk that the requester may already possess such other information that segregation would be ineffective to protect exempt information.

Sec. 4. Business Confidentiality

This section proposes several alterations of the Act's standards and procedures for determining the confidential status of business information, as well as dual clarification of the Trade Secrets Act/FOIA interface:

a. Court-Ordered Transfers: This amendment to 5 U.S.C. § 552(a)(4)(B) would give courts the express authority to order the transfer of so-called "reverse" FOIA actions brought under the APA, for consolidation with "straight" FOIA actions involving access to substantially the same records, without altering the jurisdictional bases for either of such actions.

b. Exemption 4 Amendments: These amendments to 5 U.S.C. § 552(b)(4) would:

1) make clear that Exemption 4 is intended to protect against any economic injury, including impairment of financial or business interests, as well as competitive interests;

2) make clear that Exemption 4 is intended to protect the interests of any person or entity, including non-profit entities;

3) provide that Exemption 4 does not permit the withholding of the prices or basic terms of any awarded public contract, except to the extent a contract may provide for a license to or access by an agency to information covered by the exemption;

4) require agencies to notify submitters of information who have made a good faith claim that such information is subject to Exemption 4 of the receipt of any request under the FOIA for access to such information, unless the agency determines prior to giving notice that the request for such information shall be denied in its entirety;

5) provide submitters with the opportunity to support their claims of confidentiality during the processing of a request;

6) require agencies to notify submitters, at least ten working days prior to disclosing any such information, that a request for such information will be granted, in whole or in part; and

7) specify that discretion may be exercised to disclose records over the objection of the submitter only upon a written determination that disclosure would provide substantial public benefit.

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c-d. Trade Secrets Act/FOIA Interface: These amendments provide two complementary means of clarifying the ambiguous interface between the Trade Secrets Act and the FOIA. The first proposal is an amendment to the FOIA; the second is an amendment to the Trade Secrets Act. Both proposals provide that the mandatory disclosure of information in response to a FOIA request will not be deemed violative of the Trade Secrets Act. Additionally, the amendments proposed for each Act establish the standard that an agency may discretionally release Exemption 4 information only upon a written determination of substantial public benefit.

Sec. 5. Law Enforcement

a. This subsection provides specific protection for sensitive government manuals, employee instructions, prosecutorial guidelines and similar materials by clarifying Exemption 2 expressly to encompass those types of documents.

b. This subsection adds a new subsection (c) that would allow a criminal law enforcement authority to exclude records pertaining to organized crime, terrorism, or foreign counterintelligence from mandatory disclosure for a moratorium period of five years following the completion of an investigation or related legal proceedings. To accommodate situations involving overriding public interest or extreme sensitivity, the Attorney General will promulgate regulations that will provide for disclosure before the expiration of the five-year period, and continued withholding after the conclusion of the five-year period, in appropriate cases. Records of other law enforcement investigations would be excluded from mandatory disclosure for a moratorium period of three years. Attorney General regulations will provide for an earlier release of information for which there is an overriding public interest in disclosure. All such records may not be destroyed for a specified period of years following the expiration of the moratorium period. Detailed definitions

of the terms "foreign counterintelligence," "terrorism" and "organized crime," drawn from the language of the proposed FBI charter, are included in new subsection (h) to establish when records fall into the moratorium categories.

c. This subsection adds a new subsection (d) to provide that the FOIA shall not apply in any way to informant records maintained by a law enforcement agency under an informant's name or any other personal identifier, whenever requested by a third party according to such name or personal identifier. Such records could lawfully be ignored within the context of such a request.

d. This subsection amends the confidential source provisions of 5 U.S.C. § 552(b)(7)(D) to exempt information that would tend to disclose the identity of a confidential source or that may have been derived from more than one source. Also, state, local, and foreign governments are included as potential confidential sources.

e. This subsection amends 5 U.S.C. § 552(b)(7)(F) to allow records to be withheld if the life or personal safety of any person would be endangered by their release, rather than law enforcement personnel only.

f. This subsection allows the Attorney General to promulgate regulations restricting the use of both the FOIA and the Privacy Act of 1974 by felons in prison under state or federal law, and by persons acting on their behalf, taking into account the public information purposes of the FOIA, as well as other specified governmental interests. It is intended that this provision, although proposed for inclusion in the FOIA only, would govern access under both Acts.

Sec. 6. Foreign Intelligence

This section creates a new exemption for information obtained by an intelligence agency from a source other than a U. S. Government employee, for information which tends to identify an intelligence source or anticipated source, and for information about the design, function, or use of technical

intelligence collection systems. Not included within the exemption are records pertaining to experiments that might endanger the health or safety of human beings, or requests by citizens or permanent resident aliens for information about themselves contained in intelligence agency files.

Sec. 7. Discovery and Litigation

a. This subsection provides a new exemption for records the disclosure of which would interfere with a pending or anticipated civil or criminal proceeding, including settlement negotiations, in which the United States is a party or has a substantial interest. This subsection also provides an additional new exemption for any records generated in connection with efforts to settle legal actions with the United States.

b. This subsection amends 5 U.S.C. §552(a)(4)(B) to expressly authorize a court's review of a representative sample of the documents at issue and give the court flexibility in ordering other efficient review procedures as warranted.

Sec. 8. Amendment Concerning Wrongful Removal of Records From an Agency.

This section amends 5 U.S.C. § 552(a)(4)(B) to provide that where records have been removed from the possession of an agency, the court may join as a party to litigation any person presently in possession of the records for the purposes of determining whether the records were wrongfully removed from the agency. Upon a determination of such wrongful removal, the court may then order the return of the records to the agency for full processing under the FOIA. The court may also retain jurisdiction for the purpose of determining the merits of a suit by the requester for any information contained in the records which the agency has found to be exempt from disclosure.

FREEDOM OF INFORMATION ACT AMENDMENTS

EXPLANATION

Sec. 2 Time Limits

The experiences of agencies receiving the bulk of requests under the Freedom of Information Act have shown that a majority of requests cannot, as a practical matter, be processed within the 10-day period presently provided by the statute. The courts have taken cognizance of this fact and have approved the first-in-first-out approach used by most agencies in processing requests, which implicitly acknowledges the common impossibility of full responses within the 10-day period. The backlog and contributing factors, however, vary greatly from one agency to another.

The proposed amendments seek to require agencies to respond quickly to requests for records that are both clearly identified and are not voluminous, while providing the agencies with additional response time for all other requests for records. The amendments also ensure that each requester promptly receives either a full response or a full explanation of the circumstances that require additional time for the completion of such a response. The initial response period is extended from 10 to 30 working days. Also, each agency is to promulgate regulations governing the circumstances in which the agency may take longer than 30 working days, but no more than one year, in which to provide a complete response to a request. This allows each agency to promulgate regulations that reflect its own unique circumstances. Where an agency needs to take longer than 30 working days to process a request, it must notify the requester of that fact and indicate the reasons for the delay. In no case may the agency take longer than 1 year to fully respond to a request or more than 6 months to adjudicate fully an administrative appeal. A list of factors is provided that agencies may use for guidance in drafting their regulations.

Sec. 3. Reasonably Segregable

The requirement that agencies segregate and release those portions of requested records that are not exempt has in many instances led to the release of documents containing nothing more than words or fragments of sentences that are unintelligible out of context and provide no meaningful responsive information to the requester. In other situations, where an agency releasing records may believe that it has deleted all information that could identify a confidential source, the person requesting the record may possess such additional information that even the fully segregated record would reveal to him or her the source's identity. In other situations, requesters frequently ask for all information held by an agency on a given subject, often consisting of information that is already in the public domain, e.g., newspaper or magazine articles, copies of public records and the like. It makes little sense to require the government to reproduce material, either at its own expense or or at the expense of the requester, that is easily obtainable by the requester from other public sources, often at no charge.

The proposed amendment seeks to alleviate each of these problems by allowing an agency to consider several factors in determining whether information in requested records is reasonably segregable. Where requested information is already available to the public, the agency would be required to furnish the requester with a list of such public sources in its response.

Sec. 4. Business Confidentiality

In recent years, problems surrounding the treatment of sensitive business information under the FOIA have become increasingly common and complex. There is great confusion over the appropriate standards and procedures for determining what business information must be disclosed, may be disclosed, or must be withheld, causing widespread dissatisfaction within the business community, among various public interest groups, and among other interested parties

such as academics and the news media, not to mention in federal agencies. This controversy has led to the enactment of numerous specialized confidentiality statutes and the proliferation of numerous FOIA and "reverse" FOIA suits, resulting in many vague, complicated, and often inconsistent decisions on the treatment of business information.

Both the business community and the general public need reassurance that fair and reasonable standards and procedures can be established to minimize the risk of economic injury to submitters of business information, while at the same time maximizing the public's ability to obtain information that would substantially benefit public health, safety, or general welfare. Of equal importance, the many government agencies encountering increasing difficulties in obtaining information from business entities must be guaranteed that the free flow of such information is not unduly impaired.

The four proposed amendments affecting business information are designed to remedy both the substantive and procedural shortcomings of the current law, thereby improving the flow of information to federal agencies, reducing the number of FOIA and "reverse" FOIA suits filed, and providing FOIA requesters, submitters of information and the courts with clearer standards for determining whether business information should be disclosed. In the drafting of these amendments, an attempt has been made to balance the interests of the general public, the business community, and government agencies.

a. Court-Ordered Transfers: This proposed amendment is designed to redress the complications that can arise when a submitter of information files a "reverse" FOIA suit in one district and a requester files a FOIA suit in another for the same information. By expressly authorizing courts to transfer and consolidate actions that involve substantially the same records, these potential problems and burdens can be avoided. The proposed amendment will better enable the courts to promote efficiency and fairness in situations where both requesters and submitters seek to litigate against the agency and possibly against each other.

b. Exemption 4 Amendments: The proposed amendments to Exemption 4 address several problems surrounding the application of the FOIA to business information. One of the primary concerns of the business community, for example, is that it is not always provided with adequate notice that a FOIA request for submitted information has been filed. Often this lack of notice has precluded submitters from presenting to a government agency additional justifications for their confidentiality claims or from obtaining access to the courts for an order temporarily enjoining disclosure. Many agencies have regulations requiring such notice, while other agencies rely on vague understandings regarding notice, and still others refuse to give notice under any circumstances. These inconsistent and sometimes non-existent policies regarding notice have resulted in the increasing reluctance of the business community to cooperate fully with the government through the voluntary submission of business information due to its legitimate fear that such information may be released without the opportunity for objection and full court challenge.

The proposed amendment would require all agencies to adopt specific notice regulations and would thus ease considerably this business community concern. While these notice requirements would create some additional FOIA burdens for agencies with large amounts of business information within their files and might slow the processing of certain requests, these difficulties would be more than offset by the improved flow of necessary business information to government agencies and by the fact that decisions concerning the release of submitted information would be based on more complete knowledge of the actual sensitivity of the information. Moreover, since submitters of business information would have an opportunity at an early processing stage to argue their positions for confidential treatment, there should be fewer "reverse" FOIA suits filed with the courts.

This proposed revision of Exemption 4 would also clarify or correct the scope of that exemption in three important substantive respects. First, the change of "a" person to "any" person would

make clear that Exemption 4 protects the confidential business information of non-profit organizations (universities, hospitals, mutual insurance companies, etc.), just as it protects similar information of entities organized for profit. This provision would expressly overrule the decision in Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), and is necessary because many non-profit organizations have the same business vulnerabilities as their for-profit counterparts. Many non-profit entities must survive in a financial environment in which they must buy, sell, borrow, lend, raise capital, and run the risk of injury or bankruptcy if their business affairs are jeopardized by release of their confidential business information. Some of them, such as mutual insurance companies, are in very direct sales competition with profit-making stock insurance companies. Others, such as universities, are in direct competition with large corporations for securing research grants. Even entities that do not compete for their revenues within a recognized market would be subject to economic injury where disclosure of their confidential commercial or financial information subjects them to higher operating or capital costs or a diversion of revenues to other markets. For all of the above reasons, non-profit organizations should have the same protection for their confidential business and financial information as for-profit entities.

Second, the insertion of the language "where release would impair the legitimate private competitive, financial or business interests of any person" is necessary to clarify and possibly expand upon the interpretation of Exemption 4 in the leading case of National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Essentially, that case holds that information falls within Exemption 4 if its release would produce a substantial risk of "competitive" injury to the submitter of the information. While most business injury is experienced vis-a'-vis competitors, there are some injuries that an enterprise may suffer in its relations with suppliers of capital, labor or material, or even in its relations with customers, without benefit to its competitors. This is particularly true in the case of small isolated enterprises

that may have no direct competitors. The proposed amendment would make clear that Exemption 4 is aimed at any economic injury to a business entity, rather than exclusively at competitive injury.

Finally, the last clause of this proposed amendment would make clear that information reflecting prices or other basic terms in awarded government contracts must generally be made public. The award of a government contract is a final agency action, involving the expenditure of public funds, and the taxpayers are entitled to maximum disclosure of such matters. The disclosure of the prices and other basic terms of government awarded contracts should serve as a deterrent to any possible corruption in the procurement process. Honest businesses should not be inhibited from applying for government contracts because of this proposal, particularly as the proposal does provide for the withholding of trade secrets and similar information in situations where the government intends to purchase only limited rights of access to, or to the use of, such information.

c-d. Trade Secrets Act/FOIA Interface: One of the most confusing aspects of FOIA law today is the interface between the FOIA and the Trade Secrets Act. Agencies are frequently put in a quandary when forced to distinguish between business information that may be released to a FOIA requester and that which must be withheld. Furthermore, many agencies are reluctant to exercise their unquestionable discretion to release Exemption 4 material where there would be a substantial benefit to the health, safety or welfare of the general public, due to an understandable fear of subjecting their employees to the criminal penalties of the Trade Secrets Act. The Supreme Court's decision in Chrysler v. Brown, 441 U.S. 281 (1979), has only added to this uncertainty, with the unfortunate result that information that may and should be released for the public benefit is often withheld from public disclosure.

These proposals present two complementary approaches to solving these problems; they parallel one another and should be equally effective. Both approaches would make clear that the release of business information pursuant to a FOIA

request would not be deemed violative of the Trade Secrets Act. Additionally, the amendments proposed for each Act establish the standard that an agency may exercise its discretion to release information subject to Exemption 4 only when there would be a substantial benefit to the health, safety or welfare of the general public. The inclusion of such a standard for discretionary releases of business information should provide relief to both the business community and public interest groups. The business community should be assured that agencies will not arbitrarily decide to release its sensitive business information in the absence of a specific countervailing public interest. In turn, public interest groups would know that all agencies, including those possibly regarded as too business-oriented, would be guided by a specific substantial public interest standard governing the discretionary release of exempt business information.

Sec. 5. Law Enforcement

a. The correct interpretation of Exemption 2 of the FOIA, specifically regarding sensitive government manuals and other instructive materials for government employees, is badly in need of clarification. The prevailing interpretation allows criminals or potential violators of the law to gain access to records detailing the methods, techniques and priorities employed by government investigators and prosecutors, which theoretically gives those persons all the information needed to evade the arms of the law. This was hardly the intent of the sponsors of the original Freedom of Information Act and this subsection seeks to correct this unduly narrow application of the law by expressly including such materials within the exemption.

b. Records pertaining to organized crime, terrorism and foreign counterintelligence are the most sensitive records criminal law enforcement agencies possess. In many cases, such files reveal particularly sensitive sources and methods as well as the extent of critical ongoing investigations. A great many

of the requests received by law enforcement agencies come from individuals or criminal organizations evidently trying to identify the person or persons who may have given information to the government leading to their arrest and conviction. This subsection seeks to prevent that abuse of the Act by establishing a moratorium of 3 or 5 years before such records are subject to the FOIA. A specific requirement that records be kept for a period at least equal to the moratorium ensures that eventual access to the records would not be precluded through agency records destruction policies.

c. A serious problem faces a federal law enforcement agency whenever it receives a FOIA request for the file of a named individual who happens to be, or to have been, a long-term confidential source. It is the policy of federal law enforcement agencies such as the FBI not to process any such third-party FOIA request without a notarized statement from the named party authorizing the requester's access -- and that usually solves the problem for informant files. However, the FBI has received three "authorized" FOIA requests for informant files within the past year, in each instance under circumstances in which the informant evidently could not withhold such an authorization without casting suspicion on himself as an informant. For its part, the FBI in such a situation cannot flatly refuse to honor the authorization -- nor could it of course withhold the entire file based upon Exemption 7(D) -- without compromising the source. The only practical solution would be to completely disregard an informant's file as agency records in the context of such a FOIA request. Although the FBI has thus far been able to protect each of these three particular informants due to fortuitous procedural developments in each case, it is only a matter of time until the problem recurs in a form that defies solution. Of particular concern, of course, is the potential use of the FOIA in this way by extralegal organizations or groups to ferret out suspected informants within their midsts.

This proposed amendment to the FOIA, establishing a special exclusion provision separate and apart from the exemptions in subsection (b), would authorize the FBI and other federal law

enforcement agencies to treat informant records as not agency records within the scope of any third-party FOIA request. With this provision, an agency could lawfully process such a request with respect only to any collateral records pertaining to the informant in its possession; or, if no such other records exist, it could lawfully and truthfully provide a "no records" response to the requester. It is believed that only with such a provision can federal law enforcement agencies adequately protect their informants, as well as their own related institutional interests, under the FOIA.

d. While the present law allows for the withholding of information that would identify a confidential source, there are often times when information might tend to disclose the identity of such a source, especially to a requester who might possess additional pertinent information not in the hands of the government. Where the agency cannot unequivocally attest that the information would disclose the identity of a confidential source, the FOIA has often been applied to require disclosure of the information. In order to protect confidential sources more fully, this subsection would allow the withholding of information that would tend to disclose the identity of a confidential source. The subsection adopts the language of several courts and is consistent with the legislative history of Exemption 7.

Additionally, the subsection also allows for the protection of information derived from more than one source even when only one of which is confidential. When the subject of a file seeks information to try to discern its source, the fact that the information may also have come from a non-confidential source will not deter the requester from acting on the assumption that the informant was the source. Finally, state or municipal governments, or the governments of other nations may serve as sources of confidential information. This subsection endorses the broad holdings of several courts and clarifies that the identities of such institutional sources will also be protected in those instances where they have provided confidential information.

e. Present law allows for the withholding of a record if the life or personal safety of a law enforcement officer would be endangered by its release. There is no reason for this treatment to be given to law enforcement personnel to the exclusion of all others, and this subsection would broaden the existing exemption to provide for the safety and physical well-being of any person, not law enforcement personnel alone.

f. This subsection would allow for termination of the common prisoner practice of making requests for the purposes of identifying those who may have been responsible for their convictions by reviewing their own files or of educating themselves to avoid detection or capture in the future by reviewing other non-exempt materials. It attempts to rectify this misuse of the FOIA by authorizing the Attorney General to promulgate regulations restricting the use of the FOIA by felons in prison, or by those evidently acting on their behalf, with the requirement that the regulations take into account all relevant public interest factors. This subsection would not diminish the rights and privileges convicts now enjoy under the rules of civil and criminal procedure or habeas corpus provisions.

Sec. 6. Foreign Intelligence

This amendment is specifically designed to deal with the problems encountered by the CIA and other intelligence agencies in their efforts to gather intelligence information overseas, where the prevailing perception that all information given to any U.S. Government agency is subject to release under the FOIA has led to a marked diminution of the number of cooperating sources and of the extent of information that such sources are willing to provide. The amendment seeks to provide protection to sources and anticipated sources as well as for the delicate information collection systems used by the CIA and other intelligence agencies. The amendment preserves the rights of U.S. citizens

and permanent resident aliens by specifically allowing those individuals to request information about themselves that may be contained in agency files.

Sec. 7. Discovery and Litigation

a. Virtually all agencies engaged in litigation have experienced the abuse of the FOIA by attorneys attempting to circumvent the Federal Rules of Civil or Criminal Procedure through requests for records normally sought from the government through discovery. While government agencies are obligated to operate under standard discovery rules during the course of any litigation, their opponents are free to make FOIA requests which often yield far more information than would be allowed under such rules. Moreover, such FOIA requests often of necessity must be processed by the agency personnel directly involved in the litigation, thereby affording the private party a distinct litigation advantage even where no valuable information is disclosed. Such results certainly were neither contemplated nor intended at the time the Act was passed, and the first amendment proposed in this subsection seeks to put the government back on an equal footing with the opposing party when it is involved in litigation, including the settlement thereof, by providing an exemption from disclosure for records the production of which would interfere with litigation or settlement in these sorts of ways.

The second amendment proposed in this subsection similarly addresses a related problem. Internal agency documents produced in an effort to settle legal actions to which the United States is a party should not be subject to disclosure under the FOIA. This sort of information is routinely protected as confidential, under traditional rules of evidence in litigation, as part of a policy encouraging the settlement of suits whenever possible. Disclosure of such information under the FOIA serves to undermine that policy and also places the government at a potential litigation advantage.

As such a result is not necessary to the disclosure policy of the FOIA, and is indeed harmful in these respects, this amendment appropriately exempts all settlement information.

b. As the volume of FOIA requests has increased in recent years, so has the frequency of requests involving massive numbers of documents, often consisting of hundreds of thousands of pages or more and quite frequently proceeding to litigation. This amendment is designed to authorize and encourage greater judicial flexibility in the adjudication of such massive FOIA cases through the use of efficient evidentiary techniques, such as representative sample or categorization affidavits. The use of such techniques can preserve valuable administrative and judicial resources while at the same affording the same de novo review protection contemplated by the Act.

Sec. 8. Amendment Concerning Wrongful Removal of Agency Records.

This amendment is proposed to deal with the problem arising out of the Supreme Court's recent decision in Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), in which the Court held that even though the records sought were agency records within the meaning of the FOIA, once those records were removed from the agency, there was no obligation on the agency to seek to recover the records, and the requester had no basis for proceeding against the private party then in possession of the records. Even where records have been wrongfully removed from the possession of a government agency, there is presently no way in which a requester can directly gain access to those records, regardless of the applicability of the FOIA. This situation is incongruous. To rectify it, the proposed amendment provides specific authorization for a court to join a party in possession of the records under such circumstances for the purpose of determining if the records were wrongfully removed and, if so, to provide for the return and regular processing of the records by the agency under the disclosure provisions of the FOIA.

Senator HATCH. Our next witness is Prof. Russell B. Stevenson, Jr., from the National Law Center, George Washington University. Professor Stevenson graduated from the Harvard Law School and practiced law here in Washington, D.C. He has written a book on "Corporate Information and Disclosure Under the Freedom of Information Act," and he recently presented a study for the administrative conference of the United States entitled "Protecting Business Secrets Under the Freedom of Information Act, Managing Exemption Four."

Mr. Stevenson, I am particularly interested in what you and our final witness, Mr. John Marthinsen, a professor of economics at Babson College, have to say here. Unfortunately, I really do have to go meet that appointment. However, I commit to you that I will read your statement and that of Mr. Marthinsen and that they will play an important role in this process.

If you could forgive me then, rather than interrupt you in the middle of your statement, I am going to leave now. I understand that there are a number of media people over there who want to see me before I go to my meeting. I had better leave now, but if you will forgive me, I want to express my gratitude to you and Professor Marthinsen for being here.

Staff will take the rest of the testimony and they might want to ask you some questions as well so that we can build this record as well as we possibly can.

STATEMENT OF RUSSELL B. STEVENSON, JR., PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

Mr. STEVENSON. Thank you, Mr. Chairman. I appreciate your reasons for having to leave and I appreciate also your interest in what I have to say.

I am delighted to be here this morning to talk about a subject whose importance has been stressed by the witnesses that have gone before me and the importance of which I would only underline myself.

I have submitted a written statement for the record. I thought I had mailed it in ample time to arrive in advance of the hearings. I understand, however, that it is still floating around in the recesses of the congressional mailrooms. I regret that you have not had a chance to look at it in advance of my testimony.

In the interest of time, I propose to summarize informally and fairly briefly some of the major points which I have made in that statement. Then I would be glad to respond to any questions.

I would like to make four points this morning. First, in considering the reform or amendment—whether with a crowbar, a screwdriver, or a scalpel—of the Freedom of Information Act, it is important that we not overestimate the costs of the act. Second, it is equally important that we not underestimate its benefits. Third, I believe there is a mechanism that falls short of major restructuring of the act that would assist in dealing with one particular category of costs. Fourth, I believe that there is a readily available mechanism for dealing with some of the administrative problems of the act to which I would hope the Congress and the administrative agencies would give due attention.

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COST-BENEFIT ANALYSIS

I thought for a moment in listening to the testimony of Mr. Saloschin this morning that he had mistakenly picked up a copy of my testimony and was reading from it when he began to talk about the problems of conducting a so-called cost benefit analysis of any particular public policy.

After listening to him for a short while, however, I realized he was saying it better than I had said it in my prepared testimony. I would only wish to associate myself with his remarks this morning, remarks that I have amplified in my prepared testimony.

One of the difficulties of cost benefit analysis is that it contains an alluring fallacy into which far too many people who are considering questions of public policy tend to fall. That is, where the costs or benefits of a particular course of action are reasonably concrete and easily graspable, there is a tendency to seize on that side of the balance to the neglect of the other side of the balance, where the costs or the benefits are often somewhat more difficult to describe or to understand. That is a particular problem for the Freedom of Information Act.

COST-BUSINESS INFORMATION

This morning I would like to consider some of the costs that have been attributed to the release of business information possessed by the Government. In the course of my study that I prepared for the Administrative Conference, I had the occasion to attempt to ascertain the truth of the all-to-familiar charges that the Freedom of Information Act has been used as a tool for industrial espionage. I began by searching the public record to see if I could ascertain any particular instances in which the Freedom of Information Act had led to the release of confidential business information which ought to have been withheld. I was somewhat surprised, given the vociferousness of the criticism of the act in this area, that I found practically none. In fact, upon further investigation, the few examples that were cited in the public record turned out not to have been examples of the unwarranted release of confidential business information at all.

In most cases, they involved a good faith dispute between a submitter and a Government agency about the applicability of exemption 4. Frequently, this dispute was ultimately submitted to a court which, more often than not, largely accepted the position of the agency, saying that the information had to be released under the act. I would suggest that is not precisely a case of an abuse of the Freedom of Information Act, at least as it is now drafted.

In the absence of much hard evidence in the record, I decided to ask the Administrative Conference to post a notice in the Federal Register soliciting specific examples of cases in which confidential business information had been released under the FOIA. There were some two dozen responses to that request. Again, I was surprised to find that only a handful of those responses contained alleged cases in which there had been an abuse of the act in this respect. Again, on closer scrutiny, the majority of those cases turned out to have involved a good faith dispute over the applicability of exemption 4. In several others the information in question

was clearly not within the exemption and therefore had to be released by the agency.

What does one make of this evidence? I suppose that depends on where one locates the burden of proof. I, for one, find myself provoked to a certain degree of skepticism about the widespread and vocal charges that have been made against the operation of the act with respect to business information. At the very least, I would suggest that the study does not lead one to conclude that the charges in this area have been proved. If one is skeptical, and would pose the burden of proof on the critics of the act, the study might lead one to conclude that perhaps the problems are not as severe as has been suggested, and that there may be a good deal more smoke than fire here.

In summary, I would urge that the committee pay careful attention to specific examples and press those who criticize the operation of the act in this and other areas for specific instances in which there have indeed been problems and not bow to the widespread criticism of the act simply because it comes from a number of quarters.

BENEFITS-ENHANCED COMPETITION

It is easily possible to understate the benefits of the act. The benefits that grow from open government have been discussed by a number of other witnesses here. I need not elaborate on them. I would, however, suggest that there are a number of benefits growing out of the act that are perhaps unexpected and unintentional. Let me make the somewhat radical suggestion that if the act does occasionally result in the release of business information that businesses would rather not have released, and I am quite certain that it does, this may itself have economic benefits that were perhaps unintended by the Congress when it passed the statute but should nevertheless be considered in any so-called cost benefit analysis.

A moment's reflection suggests that the very objection of businesses to the release of information to their competitors indicates that the result of the release is likely to be more effective and efficient competition as a result of reductions of market imperfections. This is a considerable benefit.

In addition, there are substantial advantages that grow out of the dissemination of technological information through the FOIA. Let me suggest that you consider, as a simple analogy, the effect of the patent system. The patent system says, to an inventor in effect, "You may have a Government benefit in the form of a limited monopoly, but in order to obtain that Government benefit, you must first disclose your invention so that others may make use of it and build on it in their own technological work." The same principle might be applied to other Government benefits, as for example, license from the Food and Drug Administration or valuable Government contracts.

There is no principle that would require us to say that there is something absolutely wrong with the Government's saying to such a seeker of benefits: "You may have the benefit, but only if you agree to disclose certain information to the Government and, in turn, through the Freedom of Information Act to the public."

Obviously, there is another side of this argument. It is perfectly clear that the disclosure of confidential business information may have an impact on incentives for technological development. That is something that we ought to be concerned about. However, I have not seen any hard evidence which demonstrates that the negative effects of disclosure on technological development are sufficiently great that they outweigh the benefits. I am willing to be convinced, but I think that at this point the case has simply not been made.

My third point relates to another variety of costs which you have already heard discussed here this morning: The direct costs to Government of administering the act. There is a means of at least partially ameliorating these costs: Simply to raise the level of fees which are charged to certain kinds of requesters. It is perfectly clear to me that it makes no sense at all for the taxpayer to subsidize a profit seeking organization which uses the Freedom of Information Act to gain information which it is going to put to use for private purposes. On the other hand, it is equally clear that such a subsidy may very well make sense in those cases in which the information is to be used for public purposes.

I would suggest that those agencies which find a large number of their requests coming from law firms and other businesses, however, be allowed to charge the full cost to them of complying with the act—not just the search and reproduction costs, but the substantial cost of the review time spent by high level personnel in ascertaining that information that should not be released is not released and that information that must be released is released.

The fourth point that I would like to make has to do with the manner in which the Government organizes itself to deal with information problems. As you may be aware, private industry has in the last few years become increasingly aware of the importance of information to its own activities. Many businesses have as a consequence, begun to establish high level positions within business whose principal function is the management of information and information resources.

The Congress reflected its own awareness of this trend in the passage last year of the Paperwork Reduction Act. I would suggest that statute, although it says nothing about the Freedom of Information Act, may provide a lever by which the administration by Government agencies of their obligations under the Freedom of Information Act may be improved.

It seems absurd to me that Freedom of Information Act compliance problems, as important as they are to Government information activities, should be excluded from the obligations of the Paperwork Reduction Act, in particular the obligation that requires each agency to appoint a single official who is responsible for oversight of the agency's information activities. It would seem only sensible that that official have within his jurisdiction the agencies' Freedom of Information Act operations, and that those operations be coordinated with the Government's other Freedom of Information activities. If that is done, I would suggest that some of the problems of administration of the act might be overcome, and that some of the other criticism of the act might be reduced as a consequence of better training, better personnel motivation, and generally better management practices.

Thank you for your attention. I would be glad to take any questions which you have.

Mr. RADER. Thank you, Professor Stevenson.

As one of the more obscure graduates of your institution, I am particularly happy to welcome you to this subcommittee.

If I could just ask a couple of questions, particularly based on your excellent paper which you presented to the administrative law conference: You mentioned at page 5 of your report that agencies do not define in advance what class of information will be withheld as secret. However, at the same time you recommend that agencies publish a list of information that they will not keep as confidential data.

Would it not increase the reliability of Government for a submitting person to know in advance that the type of document being submitted is routinely held from disclosure? It seems it would be very productive and more likely to stimulate exchanges of information than a program of only listing those items which an agency freely distributes.

Mr. STEVENSON. To the extent that it is possible, it seems to me to make perfectly good sense for agencies to publish in advance a regulation which describes certain categories of information which will not normally be released. I think that is what I said in my study.

However, there is a difficulty with that. That is that information or the importance of information is extremely time dependent. An item of information which would fall within an exemption today might well have lost its importance in 5, or 10, or 15 years, and might therefore no longer fall within the exemption. A particularly good example is an item of information which represents a trade secret today but which in 5 years may be virtually valueless as a result of technological developments in the industry.

I think one has to be cautious about making such classifications too rigid, but to the extent that they can be used, I think they make sense.

Mr. RADER. There has been a great deal of concern in this session of Congress and in others with the impacts of regulation on small business in particular. In the area of private confidential information being disclosed by Federal agencies, your report at page 79 says that a legislated notice requirement is not necessary.

Instead, you recommend that each agency work out its own notice rules. These would include a requirement for making a confidential treatment claim at the time of submission without which the submitting person loses a right to notice. You also recommend at page 77 that agencies act by their regulations to declare that whole classes of information will be disclosed without notice.

Our real question is: What impact will that have on small businesses? Many smaller firms have information which because of their relative size could be devastating if given to a competing firm by the agency. How could a smaller firm protect itself if your recommendations are adopted?

Mr. STEVENSON. I am sensitive to the problems of small business, having represented a fair number of small businesses myself. I am again not sure, however, of how significant the act's impact on

small businesses is. If a particular secret furnished to the Government is valuable to a small business, in most cases the small business could, without the expenditure of an undue amount of funds, provide adequate protection.

In my interviews with a large number of Government administrators, I was quite impressed by the high importance that they attach to protecting commercial secrets. Their attitude was not at all one of disregard for the needs of business in this area. To the contrary. Unless it is proved that the effect of the act has been to disclose trade secrets, I am not sure that the case against it in this area is not overstated.

Mr. RADER. Thank you very much, Professor Stevenson.

The subcommittee members who are not present may wish to ask further questions of you in light of your expertise in the area. Those would be sent to you in writing.

Mr. STEVENSON. I would be glad to respond to them.

Mr. RADER. Thank you very much for joining the subcommittee today and bringing your experience to us.

[The prepared statement of Mr. Stevenson follows:]

PREPARED STATEMENT OF RUSSELL B. STEVENSON, JR.

The United States is presently on the threshold of what has been called the Age of Information. That is a time, if the prognostications are to be believed, when more people in this country will be employed in assembling and processing information than are employed in the activities that give rise to it. It will be a time of enormous challenge and of great change. According to George Gilder, whose economic ideas have achieved some prominence in certain corners of this city, it will also be a time of rapidly increasing productivity and economic growth. The government is no less affected by the dramatic changes in our technological capacity to assemble, process, and communicate information than any other segment of the society. Indeed, given the critical role of an informed citizenry to our political system and the importance of information to the performance of the role of government, the Age of Information may be even more important in Washington than elsewhere. It is therefore particularly appropriate at this juncture, when the role played by information in the society is becoming the focus of increasing attention from all sides, that the Congress reexamine the Freedom of Information Act.

The Congress has, in fact, reacted to the changes of which I speak -- indeed to a certain extent has anticipated them -- by passing a number of information-related statutes over the past few years, including the Paperwork Reduction Act of 1980, the Privacy Act, and the Government in the Sunshine Act. None of these statutes is more central to the processes of government than the Freedom of Information Act. The enormous attention that this relatively simple statute has attracted over the last several years is evidence of that proposition.

I am the author of a book Corporations and Information: Secrecy Access and Disclosure (Johns Hopkins University Press, 1980) which explores some of the problems of the changing role of information in our society and devotes considerable attention to the Freedom of Information Act. I have also recently completed a study for the Administrative Conference of the United States on the problems of protecting confidential business information in the hands of the government from unwarranted disclosure under the FOIA. It is, I suppose, because of this work that the staff invited me to attempt to provide a general overview of some of the strengths and weaknesses of the Act and what might be done to improve it. It would be impossible for me to deal, even in a cursory way, with all of the issues that I am sure that these hearings will address. I will, therefore, address myself principally to some general considerations that I believe should be considered in the process of undertaking to amend the statute, in particular some broad observations on its costs and benefits. I shall also describe briefly what I think would be a significant improvement in the manner in which the statute is administered.

Cost-Benefit Analysis

Cost-benefit analysis is a tool for the formulation of policy about which one hears a great deal these days. There is no denying that, properly used, it is a powerful tool. Indeed, from a philosophical point of view, measuring the overall costs of a policy change against the benefits that it is expected to generate must certainly be one of the principal -- and in many situations, perhaps the only -- criterion for public choice.

Unfortunately, however, like many useful tools of analysis, cost-benefit techniques are capable of misuse. In some fields, in which the effects of a particular course of action can be more or less easily measured in dollars and cents, cost-benefit analysis can be applied in an almost scientific fashion. There are many questions of public policy, however -- in fact probably the majority -- in which cost-benefit analysis cannot be used in such a fashion. In such cases the cost and benefits of a particular governmental decision are not readily quantifiable. They may involve values -- such as, for example, the worth of a human life or the aesthetic benefits to be derived from an unpolluted environment -- that are nearly impossible to reduce to numbers. Even if the consequences of the policy decision can be made relatively objective, the economic effects are often simply too difficult to predict before the fact or to measure after it to permit a meaningful balancing of costs and benefits. In such cases, cost-benefit analysis in its technical sense is inappropriate.

This is not to say, of course, that the policy-maker who confronts a choice the consequences of which are not readily quantifiable should make no effort to weigh the costs of undertaking a proposed course of action against the anticipated benefits. What it does suggest, however, is that such a weighing be performed carefully and that the decision maker not allow himself or herself to be lured by the deceptive ease of quantifying some but not all of the costs or benefits into attempting to use an objective technique that is unsuitable for the choice at hand. What this all too often leads to is an unwarranted focus on the side of the equation whose consequences are easiest to quantify while the other side of the balance is ignored.

One of my favorite illustrations of this temptation is a book I reviewed several years ago which purported to be a "cost-benefit analysis" of state securities regulation statutes. The author went on at great length about the costs of this sort of legislation, assigning dollar figures to them with great confidence. When he came to the benefits, however, he allowed himself only one chapter. That chapter was two-and-a-half pages long, and contained not a single word about any benefits. Having thus misled himself, it was not hard for the author to conclude that state securities regulations was a bad idea.

Unfortunately, many critics of the Freedom of Information Act have been led astray by the same fallacy. They rightly suggest that we ought, in evaluating the Act, to consider its costs, a long list of which they are then quite happy to recite. It is relatively easy for them to do so as many of these costs can be expressed (although often only in rather crude estimates) in dollar terms. Having made their estimates of costs, however, most critics seem content to terminate their analysis, concluding that the FOIA, or some particular provision thereof, costs a great deal and should therefore be changed. What they neglect to undertake is a discussion of the considerable benefits of the FOIA. These, as we all know, have to do with the responsiveness of the government to the citizens whose interests it serves, the confidence of the public in the efficiency and fairness with which the law is administered, the ability of individual citizens to ascertain whether they are being fairly treated, and so on. These are not values to which one can easily attach numbers; but they are important. It is not too much to say that they are central to the well-being of a democratic society. And yet it is too often the case that in discussions of alleged problems with the Freedom of Information Act these considerable benefits tend to get lost in debate which focuses on the more tangible, and therefore more easily discernable, costs of the Act.

It is this natural human tendency against which I wish to urge you to be on your guard. In the course of your deliberations on proposed revisions to the FOIA it is important that you not fall into the trap of focusing on the more measurable, and often more dramatic, costs of the FOIA without considering also the important but fragile benefits it affords, benefits that changes in the Act could easily eliminate.

Having urged upon you this broad philosophical principle, let me descend at least slightly to a somewhat more specific discussion of some of the particular costs and benefits of the FOIA. A great deal has been said about these costs and benefits in the voluminous testimony on the Act before this and other committees of Congress over the last several years, but I am convinced that a satisfactory understanding of the problems has yet to emerge.

Costs of the FOIA

The most obvious, and probably the most easily quantifiable, costs of the FOIA are those experienced by the government in administering it. They are high. It is by now a standard joke to recount in discussing these costs that at the time of enactment of the 1974 amendments to the FOIA, the Congressional committees concerned estimated that the additional costs to the government

of the legislation would be between $40,000 and $50,000 per year, whereas a 1979 survey by the Justice Department concluded that the annual direct costs of complying with the Act were some $47.8 million.

The situation is probably a good deal worse than that. Although I have spent some time looking, I have unearthed no other studies of the present costs of the FOIA to the government. Agencies are not required to keep adequate records of the amount they expend on complying with the Act, and few of them do. My own estimate, however, is that the Justice Department's figure is, probably, as its authors acknowledge, extremely low. The study does not purport to include anything more than the direct costs of searching for and copying documents requested under the FOIA. Apparently some government agencies failed to respond to the survey conducted by the Department and are, therefore, not included in the study. More importantly, the study includes neither overhead costs nor the extremely important costs of professional time expended in reviewing documents to assure that exempt information is not released. If these costs were included in an estimate of the total costs to the government of complying with the Freedom of Information Act, I have no doubt but that the figure would be many times higher than $47.8 million.

Of course, a substantial portion of the expenditure of public funds on compliance with the FOIA results in direct, though not easily quantifiable, public benefits. Where information gathered by use of the Act is employed by the press, by scholars, or by public interest organizations to study the workings of government and to influence government policy, we are all, in the end, better off.

It is no secret, however, that this sort of use is not the only one to which the FOIA has been put. Indeed, in many agencies, it is not the major one. Several of those agencies that received the largest numbers of FOIA requests have reported that some 80% of their requests are filed by or on behalf of businesses, presumably to gather information to be used by businesses in pursuit of profits. As I shall make clear momentarily, I have no problem in principle with this use of the Act. It does not, however, seem to make sense for the taxpayer to subsidize it.

Under present law, an agency cannot charge a requester more than the "direct costs" engaged in searching for and copying documents. This excludes the "overhead" costs of FOIA compliance which, in many agencies, may be substantial. More importantly, it excludes the cost of the enormous number of hours spent by high-level professionals in reviewing documents to make sure that no information whose release is required by the FOIA is denied the requester and, on the other hand, that exempt information whose

release might damage the government or some other party is not released. Although there are no useful figures on the amount of these costs, estimates by those who are familiar with the operation of the Act range as high as 75 to 80 percent of the total costs for some agencies. The failure of agencies to recover these substantial costs incurred for the benefit of those who will use the information for their own private purposes is seldom justified by any associated public benefit. There is good reason, therefore, to consider amending the law to permit agencies to recover the entire costs of complying with the FOIA when the request serves private rather than public interests. Since this would result in substantial increases in the level of fees presently charged, this change ought to be accompanied by an improvement in the fee-waiver practices prevalent in many agencies that would guarantee that the larger fees not be imposed where the request is for information whose release, in the words of the Act, "can be considered as primarily benefiting the general public".

Aside from the direct impact on the treasury, critics of the FOIA have pointed to a number of other costs, some real and some probably not so real, that flow indirectly from the operation of the Act. Among the most frequently mentioned are the diversion of the talents and energies of administrators from their primary mission, threats to national security arising from the release of sensitive information, similar threats to law enforcement activities, and damage to business resulting from the release of confidential financial or commercial information. I am sure you will hear a great deal about these and other costs of the FOIA in the course of these hearings, and I do not wish to discuss them in great detail.

I would like, however, to use one of these problems with which I am most familiar to exemplify my concern with the manner in which critics of the Act often use plausible, but frequently unsupported charges of injury to the interests they represent to focus attention on alleged "costs" of the Act and away from the associated benefits.

The last few years have seen a rising chorus of protest from the business community about alleged injuries it has suffered as a result of releases under the Act of trade secrets and other confidential commercial or financial information. In the course of my recent study of exemption (b)(4), the so-called "business records exemption", I had occasion to attempt to evaluate the validity of these claims. I began by searching the public record for evidence of specific instances of violations of business confidentiality through release under the Freedom of Information Act of sensitive business information. I was surprised to find practically none. Indeed, upon closer scrutiny, almost all of the alleged instances that I did find appeared not in fact to have involved the release of information that would have been exempt

under the Act. Many cases involved a simple difference of opinion between the agency and the submitter of the information as to the applicability of exemption 4. And in most of these the dispute was submitted to a court for ultimate resolution. More often than not the court agreed with the agency's view of the situation.

Since the public record contained so little in the way of support for the large volume of criticism of this aspect of the FOIA, I asked the Administrative Conference to publish a notice in the Federal Register specifically requesting information on instances in which exempt information had been released. To provide wider dissemination of this request, I wrote a short article in a widely-read legal journal drawing attention to the request.

The notice generated approximately two dozen responses. The greater number made no mention at all of the kind of specific abuse that had been sought. Indeed, at least two corporations admitted that they knew of no such incidents. Some of the responses did cite cases in which it was claimed that exempt information had been released. However, on closer examination, the overwhelming majority of those instances turned out, again, to have involved a mere difference of opinion between the agency and the submitter as to the applicability of the exemption. And, again, in most of those instances, the matter was ultimately resolved in the courts. These are hardly examples of failures of the law to protect confidential business information from the alleged ravages of the Freedom of Information Act. On the contrary, they appear to be cases in which the law has functioned as one might desire it to function. At worst, they have exposed business to the costs of going to court to seek to protect their information. While these costs are not to be lightly dismissed, they are not qualitatively different from the costs of compliance with any other form of government regulation. At the very least, they can hardly be said to strike at the roots of the competitive system as many of the critics of the Act seem to suggest.

Among all of the submissions, there were a mere handful in which it was clear that exempt information had in fact been inadvertently released.

What does all this show? At the very least, the allegations by some in the business community that the FOIA has led to the wholesale release of business secrets remain unproved. That does not necessarily mean, of course, that this admittedly unsystematic study proves the contrary. There may well be reasons why business prefers not to come forward with evidence of the sort the study sought.

On the other hand, the charges that business has made against the Act have been so vociferous and so widespread that one is inclined to want to put the burden of proof on business with respect to this issue. That inclination is strengthened by the observation

that the bulk of the evidence that business has produced purporting to support its case turns out, when scrutinized, to be defective. Under these circumstances it would seem that a certain skepticism is in order.

On the basis of the evidence I have seen, I am inclined to believe that there is a great deal more smoke here than there is fire. That is not to say that there are no problems with the manner in which government deals with confidential business information. Even one case of the release of information that results in "substantial harm to the competitive position of the submitter" is one too many. But unless it can be demonstrated that there are in fact serious problems in this area, Congress should not react to the noisy clamor that has been raised by either major alterations in the substance of the exemption or by the erection of a complex and costly procedural structure intended to deal with a problem that does not exist.

In short, in the course of these hearings, I urge you to press those who come before you to make general criticisms of the functioning of the Act for harder evidence of their claims than they have heretofore placed on the public record. Alhough I have been talking here about the problems of exemption 4, the same might be said of other alleged problems with the FOIA.

Benefits of the FOIA

As I have indicated the benefits of the Freedom of Information Act are often difficult to assess. They are, however, a good deal more numerous and more diverse than is generally recognized.

Most think of the FOIA as principally a tool for improving government by allowing citizens better means to oversee its activities. That appears to have been the principal concern of the Congress at the time of the enactment of the statute. The Senate report on the bill that became the FOIA quoted the words of James Madison: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."*

While the facilitation of the democratic process is clearly the major purpose of the FOIA, the Act has also proved to have a number of other benefits, both public and private, not all of which were conceived of at the time of its enactment. The 1979 Justice Department study to which I previously alluded asked for, in addition to an estimation of the costs of administering the FOIA,

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*S. Rep. No. 813, 89th Cong., 1st Sess. at 2-3 (1965).

a statement of the benefits that agencies believed to flow from the Act. The summary of the agency responses, which is appended to this statement, is enlightening. The respondents described a large number of benefits, many of them relating to improving citizen participation in government, but a great number of them somewhat less obvious. Interestingly enough, among the benefits listed were a number of gains to the government growing not out of citizen participation but out of the simple need to comply with the Act. For example, respondents reported they had experienced "improved record quality", "improved record access", "improved documentation relating to decision-making", and "improved security classification assignments", as well as a number of other improvements in agency functioning that do not leap to mind as consequences of a statute such as the FOIA.

To turn for a moment to the sort of advantages that Congress intended to flow from the FOIA, a classic example is found in increased access to health and safety testing data received by agencies such as the Food and Drug Administration. This is not the place for a complete catalogue of those benefits. For an excellent enumeration and elaboration, I commend to your attention an article in a recent number of the Harvard Law Review* which, after weighing the benefits of disclosure of such data against the costs, concludes:

> "[A]n analysis of the competing policy considerations demands that health and safety data be disclosed except where research incentives would be substantially and demonstrably hindered, and could not be protected by methods other than nondisclosure. The case for disclosure is clear; the case for nondisclosure is weakened by conflicting economic studies as well as the existence of alternative means for protecting research incentives."**

The release of sensitive business information of the kind discussed in this article has been, as you are well aware, the focus of a great deal of attention in discussions of the costs of the FOIA to the economy. I would like, however, to advance the radical suggestion that, in many cases, the release of certain kinds of business information creates substantial benefits to the economy. Indeed, a moment's thought compels the conclusion that there must be some benefits to the economy from the release of the kind of information about which business has complained so strongly. The complaints are based on claims that the information will give an advantage to competitors. If this is true -- and in many cases

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*McGarity and Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 Harv. L. Rev. 837 (1980).

**Id. at 840.

it probably is -- the immediate result can only be lower prices, which will benefit consumers and taxpayers.

In more general terms, economic theory teaches us that in a competitive economy the rapid dissemination of information enhances competition and is therefore beneficial. There are at least two reasons for this: First, the spread of information tends to increase the overall rate of technological progress of the society; and second, it enhances the vigor of competition by tending to eliminate market imperfections.

This analysis does not, of course, go far enough. There are important drawbacks to the disclosure of business information. The most obvious is that a certain degree of secrecy is necessary to protect incentives to innovate. A business is far less likely to engage in research and development if it knows that its competitors will have immediate access to the results of these efforts and can therefore prevent it from reaping the benefits.

This does not necessarily mean, however, that guaranteeing secrecy is always economically efficient in all situations. Exactly how much secrecy and for how long will maximize the economic welfare of the society is a matter of disagreement among economists. This is not the place for a discussion of that problem. Suffice it to say that disclosure is, in this context, neither all good nor all bad; its effects are mixed.

Given our uncertainty about the matter and the importance of incentives for business research and development, it is necessary to be careful not to weaken those incentives unduly as a result of the disclosure of technological information through the Freedom of Information Act. On the other hand, while some measure of protection is undoubtedly needed, there is nothing that indicates that the protection furnished by the law in its present state is inadequate. Let me again urge you not to react too quickly to charges that the FOIA is undermining incentives for research and development simply because those charges are made with such frequency. We have yet seen no sound evidence of the truth of those charges.

The second objection to the disclosure of confidential information is based not on the effects of such disclosure on the system of incentives as a whole but on considerations of equity. There is a certain element of unfairness in disclosing the business secrets of one company to competitors who are not subject to the same treatment. In general we ought not to do so. Even here, however, so long as the incentives for socially productive behavior that are provided by a certain amount of secrecy are not destroyed, society, at large, may reap economic benefits from disclosure.

A simple analogy will illustrate why even here we are not dealing with absolutes of right and wrong. The patent system offers a reward to innovators in the form of a limited monopoly over qualifying inventions. As a condition of that reward, however, the law requires the inventor to disclose his secrets in order that the rest of society may benefit from the resulting dissemination of technology. No one suggests that this is "unfair".

The same analysis may be applied to other rewards offered by the government, such as, for example, a profitable contract or a license to sell a new drug. It would be no more "unfair" for the law to require, as a condition of awarding such a benefit, that the recipient divulge certain information to the public than it is to require that a patent applicant publicly disclose the details of his invention. There are reasons of public policy -- the possibility that the government would be limited in its ability to procure high quality goods, for example -- why we might wish to afford some degree of protection (as indeed we do) for the commercial secrets of those who deal with the government. But there is no absolute principle that demands absolute protection.

I do not mean to suggest by what I have said that the federal government ought to put itself in the business of handing out commercial secrets to all comers. What I do suggest, however, is that the position that business confidentiality should be elevated to some sort of a sacrosanct status the merest invasion of which threatens dire consequences for the economy is a gross exaggeration.

Critics of the functioning of the FOIA in this area talk of the use of the FOIA as a "tool for industrial espionage." The pejorative connotation of that phrase is simply unwarranted. The characterization would be considerably closer to the truth if it spoke of "industrial intelligence". Every well-managed business is constantly engaged in gathering information about the economy, the markets in which it operates, and the activities of its competitors. There is absolutely nothing evil or harmful about this sort of behavior. It is of the essence of a free market economy. Indeed, the economy would function very badly without it.

It cannot be denied that businesses use the Freedom of Information Act regularly as a tool of industrial intelligence. This is, in fact, one of the major uses to which the statute is currently being put.

It is also undoubtedly true that Congress did not have this use of the statute in mind at the time of its passage. As any lawyer knows, however, it is a common occurrence in the law for a rule of law originally developed for one purpose to be adapated to a different one. There is nothing malign in this sort of development. As often as not the unintended consequence of the rule of law is a beneficial one.

I urge you, therefore, in considering the role of the Freedom of Information Act in allowing the public disclosure of certain kinds of business information, to bear in mind all of the consequences, both good and bad, not merely those that might originally have been intended. One of those consequences, I would be so bold as to suggest, is that in some cases the FOIA serves as a device that improves the competitive functioning of the economy both by encouraging more vigorous competition and by fostering the dissemination and production of technological knowledge.

The Administration of the Act

My final point relates to the way in which the Freedom of Information Act is administered. As you are no doubt well aware, the FOIA is looked on in many parts of the government as an unwated stepchild. Agencies are often reluctant to allocate the resources necessary to comply fully with the mandate of the Act to what they consider at best a secondary function. Assignment to FOIA compliance is perceived by many government personnel as a career dead end. Agencies have often given little thought to the manner in which they organize themselves to deal with FOIA matters. The resulting structure is in many cases the product of historical accident rather than careful planning. Personnel who manage FOIA matters are too often poorly-trained and poorly-motivated. Under these conditions it is hardly surprising that the performance of many agencies in FOIA matters is less than ideal. Statutory deadlines are missed, documents that should be released are not, documents that should not be released are, and a great deal of time and money is wasted in disputation and litigation.

There is no way to eliminate all of the problems that are likely to arise under the FOIA by mere administrative change. There may, however, be a means of reducing them somewhat.

As you are not doubt aware, one of the consequences of the "Age of Information" of which I spoke earlier is that businesses, particularly large ones, are paying increasing attention to the problems of information management or information resources management. The field is evolving rapidly, and there is no general consensus as to what exactly "information management" means. It would, however, be generally agreed that it involves a comprehensive examination of the manner in which an organization collects, assembles, stores, communicates, and otherwise deals with the information necessary to its functioning.

Last year Congress, aware of this trend and its importance to government, took a major step toward putting this emerging philosophy into practice in the federal government when it passed

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the Paperwork Reduction Act. Although the legislative history contains references to the Freedom of Information Act, the statute, itself, does not mention it. I would be so bold as to suggest that that was an error. If there is any law that is central to the federal government's information activities, it is the FOIA. It seems less than entirely logical that a statute designed to coordinate these activities should omit the FOIA from its coverage.

From the point of view of information resources management, one of the principal features of the Paperwork Reduction Act is that it requires each agency to appoint a single official who is responsible for the coordination and management of the agency's information activity. Nothing would be more appropriate than that this official be given responsibility for the agency's compliance with the Freedom of Information Act. It is interesting to note that in the Justice Department's survey alluded to earlier, a number of agencies reported that they found that the Act had the effect of improving the qualify of agency records, access to records, and record retention standards. It seems only sensible that a statute that has these effects should fall under the aegis of an office within each agency whose responsibility it is to improve the way in which the agency manages its information resources. Not only would this be likely to benefit the information management function but it should improve the manner in which the agency handles FOIA matters. Instead of being a stepchild, FOIA compliance would become a part of an integrated information management program. This would enable the agency to develop a staff of trained professionals to deal with FOIA and other information problems who would no longer see dealing with the FOIA as a career dead end but would see it as a career opportunity. Compliance with the FOIA along with other information management activities would take its place among the more important functions of the agency rather than being given the low priority from which it now suffers in many agencies. From a broader perspective, there would be more coordination among agencies on FOIA matters and, eventually, we could expect to see the present uneven patchwork of regulations and administrative practices replaced with a more or less standard system that varied only in its details from one agency to another.

As the government enters the Age of Information, it should proceed facing forward with its eyes open rather than backing blindly into the coming period of rapid change in the way in which information is used and managed. There is no better place to start than with the Freedom of Information Act.

Gains to Public

I. Specific Interests Served

A. Commerce

1. Information on Competitors (Research grant and contract proposals; procurement contract proposals; federally mandated information submissions)

2. Information for Marketing and Developing New Business (Mailing, employee, and agency client lists; research grant and contract proposals; procurement contract proposals and procedures)

B. Small Business

Availability of Procurement Information and Proposals Enhance Competetiveness in Federal Government Procurement

C. Litigants

Disclosure of Information Under FOIA Broader and Less Expensive than under Discovery

D. R & D

Expensive Methodologies Available for Cost of Copying

E. Public Interest Groups

Accessibility of Information Promotes Public Health and Safety, Dissemination of Information, and Regulatory Agency Accountability

II. General Interests Served

A. Easier Information Access

B. Greater Public Awareness of Laws, Rules, Regulations, Policies, Procedures

C. Enhanced Government Efficiency and Responsiveness

D. Greater Public Participation in Federal Government Affairs

E. Enhanced Public Confidence in Federal Government

F. Better Quality Information at Reduced Cost.

APPENDIX

Gains to Government

I. Agency Records

A. Improved Record Quality

B. Improved Record Access

C. Development and Utilization of Record Retention Standards

II. Agency Management

A. Improved Documentation Relating to Decision-Making

B. Improved Employee Awareness and Accountability Regarding Record Development and Maintainance

C. Use of Public Disclosure Room and Index for Acquainting Employees with Agency Activities

D. Improved Security Classification Assignments

III. Agency Relations

A. Enhanced Agency Responsiveness to Public

B. Enhanced Public Understanding and Appreciation of, and Confidence in, Agency Work

C. Enhanced Public Cooperation with Agency

D. Enhanced Public Awareness of Agency Programs, Especially by Agency Clients

E. Greater Public Participation in Agency Decision-Making

F. Increased Competition among, and Better Proposals from, Bidders for Agency Contracts

Mr. RADER. Our next and concluding witness today will be Dr. Marthinsen who is a professor of economics at Babson College in Wellesley, Mass. Dr. Marthinsen received his Ph. D. from the University of Connecticut in 1974 and has since been at Babson College. He has done extensive research on international technology transfer and the effects of the Freedom of Information Act on productivity and research. Along with William Casey and Lawrence Moss, he is presently preparing a book on the economics of protection of propriety information under the Freedom of Information Act.

He is here today to give us a little advance evidence concerning the findings of that research. I believe you have brought Dr. Casey with you.

STATEMENT OF JOHN MARTHINSEN, PROFESSOR OF ECONOMICS, BABSON COLLEGE, WELLESLEY, MASS., ACCOMPANIED BY DR. WILLIAM CASEY, CHAIRMAN, ECONOMICS DIVISION

Dr. MARTHINSEN. I would like to mention before I start that with me is Dr. William Casey, a coresearcher and the chairman of Babson College's Economics Division. Dr. Lawrence Moss, the other member of our research team, extends his regrets to this committee that he could not be here for the presentation of this report.

We appreciate the invitation of this subcommittee to speak with you today regarding our research on the impact the Freedom of Information Act may have had upon research, innovation, and productivity in the United States. To my knowledge, our research is the first significant analysis of FOIA as it relates to U.S. entrepreneurship and innovation. I will refer the subcommittee to my written submission for much of the background information, but I would like to review some of the salient features of our research findings and the direction of our current research.

Our investigation of FOIA follows other studies that we have done in the areas of information flows, technology transfers, and the protection of proprietary information. We began our FOIA study in the spring of 1980 with funding from the Babson College Board of Research and without funding from any outside source. The work culminated in a paper that we presented to the Eastern Economic Association in April 1981.

Our major finding is that FOIA, while contributing to the worthy goal of a more open Government, has unintentionally violated the principle of property rights, one of the cornerstones of our economic system. Both the perceptions of the businesses we interviewed and the volume of FOIA requests to Government agencies by third-party intermediaries provide convincing evidence that there is something of value being accessed through Government files.

Congress and the courts have not been blind to these realities. Attempts have been made to identify those types of business information which if released by the Government would produce competitive harm. In effect, attempts have been made to draw a line of demarcation between those types of information which may be disseminated freely without harming the submitter and other types which should be protected.

It is our contention that the line is drawn improperly. Our research has led to the identification of a special body of knowledge

that is vital to the exercise of entrepreneurship but which has been generally overlooked by the legal, congressional, and administrative interpretations of exemption B(4). This body of information has consistently been ignored by social scientists, as well. We call this information "circumstantially relevant business information," or CRBI for short.

CRBI is not the sort of information that would appear in an engineering text or constitute a patentable invention. According to current legal terminology, it would come under the heading of "trade secret" or "know-how." Yet in most cases, it is not a technical formula or secret process. It is not the type of information that would be deemed important by a scientist, engineer, or technician, and it would probably go unnoticed by the media and casual observer. Rather, CRBI is "knowledge of a particular time and place." The existence of this information is important to the subcommittee because its disclosure tends to erode competitive advantage and therefore to discourage entrepreneurial activity.

CRBI consists of knowledge of where bargains can be found, knowledge of whom to contact in large organizations, knowledge of the cheapest mode of transportation, knowledge of unsatisfied demands and the means of satisfying them, knowledge of the true risks as compared to the perceived risks of an innovation; it is knowledge of how to design a laboratory test on a new class of compounds. It includes knowledge of where resources are believed to be undervalued and where resources are believed to be overvalued. This knowledge, while innocuous and mundane to Federal executives, may be of immense importance to competitors of information submitters. This information may not be "the product of human design," and often people stumble upon it much like scientists stumble upon research results. Frequently, it is fragmented in its economic value and difficult to assess. The loss of any one piece of this information may not cause significant and statistically quantifiable harm to society or perhaps this firm. Yet this information is essential to the impersonal decisionmaking processes of a free society. It is a means by which a nation can continuously and incrementally devote resources to ventures of varying risks and returns without overcommitting resources to any one venture. It is a trial and error process which gives the direction and broad-based foundation for the application of scientific discoveries.

The dynamics of our economy may be viewed as a multitude of opportunities which are opened and closed with passing events. The key to success is not only the availability of opportunities but in the identification and seizing of these opportunities by entrepreneurs. The largest rewards are sometimes returns to the simplest insights, but insights which are self-evident only in the light of the new perspective created by the innovator. The gains from these opportunities are uncertain at the time the decision to innovate is made, and if they materialize, they will be transitory. Their exploitation requires a lag between commercialization of the invention and imitation by others. This lag offers the innovator a period of time over which to derive a return on his ventures.

FOIA may threaten the discovery and exploitation of this "knowledge of a particular time and place" by reducing the time lag between innovation and imitation. Dramatic proof of competi-

tive harm cannot easily be demonstrated as is now required after the National Parks case, since the loss has to do with an opportunity not taken, and decisions not undertaken cannot easily be documented. Yet ignoring the value of this information is to ignore the very incentives which give rise to new entrepreneurial ventures and the continued growth of productivity in the American economy.

Traditional economics over the last two decades has been concerned with the allocation of fixed resources to their most highly valued uses. Unfortunately, it has paid insufficient attention to the dynamic processes of innovation and entrepreneurship that lead to the discovery and creation of new resources. It is not enough to assume that the economic problem begins with given supplies of resources that have to be distributed. Rather, the problem is how to encourage individuals to develop precisely the information that will prove valuable later on. It is a supply side incentive, the purpose of which is to encourage others to grasp this knowledge of particular situations and utilize it.

We decided to see if we could find evidence of the negative impact of FOIA on the pharmaceutical industry in the United States. It is one of the most heavily regulated industries in the United States, and the FDA is one of the most heavily used agencies for FOIA requests.

Our preliminary findings are as follows. First, there is a wide gap between the perceptions of the pharmaceutical industry in regards to FOIA and the perceptions of Government agency representatives. We found the pharmaceutical industry to be philosophically opposed to the provisions within FOIA that allow for the release of information that would otherwise not be disclosed. The perceptions of our business interviewees were that the FOIA has produced more information leakages than have actually occurred and that agency officials have been less consistent in implementing the legislation than the record seems to indicate. Our view is that these perceptions are important. It is upon these perceptions that decisions to innovate are made. If there is a communication gap between businesses and Government agencies, it ought to be bridged.

An increasing portion of our gross national product is being devoted to the dissemination of information through FOIA and to business efforts to protect such information which has been made more vulnerable by this same statute. In the end, we must question whether these resources could not be better spent elsewhere.

Our second conclusion is that Federal regulations in general and FOIA in particular may be altering the product life cycle of the pharmaceutical industry to the disadvantage of the United States. The product life cycle model explains that comparative cost advantages in high technology areas are transitory. A product developed in the United States will soon find foreign imitators and may eventually lose its foreign and domestic market position as this new technology is disseminated and production shifts to lower cost countries. New innovations depend on an information diffusion lag in order to cover investment costs. Presumably, a reduction in this lag would reduce the level of investment, reduce U.S. exports and thereby reduce the international value of the dollar.

We suggest that the sequence of the product life cycle might be changing in such a way that innovations discovered by U.S. companies are produced and sold abroad before they are produced and sold in the United States. It is our position that the U.S. Freedom of Information Act and the absence of similar legislation overseas explains in part this abnormal product life cycle pattern for the U.S. pharmaceutical industry.

Initially, U.S. drugs are researched, developed, and marketed overseas because of less stringent testing requirements and because of the greater likelihood of maintaining trade secrets in the absence of FOIA type legislation. Early importation into the United States is discouraged because this may require increased FDA dictated testing, which, in turn, would mean additional data submissions to that agency, thereby promoting the possibility of information leakages through FOIA. Importation into the United States would be delayed until the product has been fully developed and market tested. Only then would the innovating firm risk potential FOIA disclosures because its significant market lead over potential rivals at this point would guarantee an adequate investment return on R. & D. expenditures.

In summary, the unauthorized disclosure of proprietary information causes a restructuring of business risks and returns. As a result, these new incentives and disincentives are likely to lead to unintended and/or undesirable results. It is our hope that a broader view will be taken by Congress in interpreting the information that should fall under exemption B(4).

That concludes our prepared statement. I offer the written statement for your hearing record. Prof. William Casey and I would be pleased to answer any questions you may have.

Mr. RADER. Thank you very much, Dr. Marthinsen.

Is there anything you would like to add at this point, Dr. Casey?

Dr. CASEY. At this point, I would be happy to respond to any questions that may be directed my way.

Mr. RADER. Thank you. That was a very thorough and thoughtful statement.

Many of the debates about the B(4) exemption will undoubtedly concern the substantive standard to be used in excluding information. Particularly at this point, the standard used is a substantial competitive harm test for confidential treatment of business information.

You said that the standard used in your study was one of circumstantially relevant business information. In what way would your new standard play a role in an economically sound interpretation of the Freedom of Information Act?

Mr. MARTHINSEN. If I might respond to that, the acknowledgment of circumstantially relevant business information would broaden the class of information that is now included under the B(4) exemption.

As it stands, the National Parks test requires what we feel is dramatic proof of competitive harm. To the extent that information might be circumstantially relevant to entrepreneurial activity, it is not information that would lead to this type of dramatic proof. However, we feel it is very important to innovation incentives. In our opinion, documented evidence, that is to say, flashing evidence

may not be available. The information we are talking about, as I mentioned in the testimony, is very difficult to put tangible borders around. It is information oftentimes in bits and pieces. Its loss is in terms of foregone opportunities.

We heard today that some commentators are addressing the question of mismanagement by the Government agencies. In our research and in our interviews, we found that Government agency representatives were very concerned about the disclosure of proprietary information. We feel that mismanagement may not be the problem. Rather it may be an information identification problem.

Moreover, attempts to categorically define information that should be withheld and should not be withheld may be beside the point. A piece of information may be more important to one firm in one industry than it is to another firm in another industry. In addition, as was mentioned by Professor Stevenson, a piece of information may lose its relevance over time. I might also add that information might gain importance over time. It depends on where that particular firm is in its own life cycle. As it matures, information could gain or lose relevance.

Mr. RADER. Thank you.

Do you have anything to add, Dr. Casey?

Dr. CASEY. I would like to reinforce one point. In our research, we were convinced that this problem is not a byproduct of Agency mismanagement. We believe that the Agency personnel who staff FOIA offices are relatively conscientious in protecting technical trade secrets, but we also believe this is the tip of the iceberg.

One recommendation is that B(4) be expanded to include other types of information which, if released, will produce competitive harm and discourage innovation.

Mr. RADER. The subcommittee was interested to note that in June of 1981, the Environmental Protection Agency received a request from Suzuki Motors for a disclosure of information filed with the agency by Toyota. In the course of your research, did you study the foreign use of the U.S. law to obtain information which is not available in foreign countries? Here in this situation, we have two foreign companies, evidently competitors, requesting information on each other via a U.S. act. Is it sound for the United States to allow such uses of its statutes?

Mr. MARTHINSEN. Our research has shown that the Freedom of Information Act is being used extensively by foreigners. There are a number of issues that arise when you talk about the use of this information by multinational enterprises. The specific part of this question that we address is the loss of information by U.S. companies to foreigners. In that sense, the loss of information to foreign competitors will reduce the imitation lag period, the period of time over which the United States would recoup its investment. Firms rely on this imitation lag period to recover the immense expenditures in research and development and to earn a return on their investment.

However, there are more issues here than just the loss of U.S. information to foreign competitors. As you mentioned in your question, it is possible, through the Freedom of Information Act, for a foreign company to spy on another foreign company. We have not addressed this issue in our research. I think that there are questions involved here beyond which we care to reserve comment or judgment.

I might also comment that you could take this issue one step farther. Through FOIA, it is also possible for a U.S. company to gain information on a foreign company if that foreign company operates in the United States. There are many combinations and permutations that arise when you talk about multinational enterprises and the dissemination of proprietary business information.

I might comment that with the expansion of multinational enterprises, you have the existence of corporations that have no home. They react to world incentives. To the extent that the Freedom of Information Act is a disincentive, it is very easy for those types of corporations to move research and development abroad. One would expect, that with the growth of multinational enterprises, disincentives and incentives will be acted upon much more quickly in the future than they have been in the past.

Mr. RADER. Have you discovered that many multinational corporations are transferring their innovative research sections abroad to avoid the Freedom of Information Act?

Mr. MARTHINSEN. This is what the last part of our study is going to investigate. There is compelling evidence that U.S. regulation, in general, has caused such a shift.

Mr. RADER. The Freedom of Information Act would just be a portion of the consideration, then, in shifting the innovations to a foreign country?

Mr. MARTHINSEN. Yes. The empirical work that has been done has mainly been trying to measure the effect of the Food, Drug, and Cosmetic Act Amendments of 1962. They have not been concerned with the Freedom of Information Act of 1966.

For example, one study by Wardell cites a dramatic shift in 1966, which coincidentally is the year of the passage of the Freedom of Information Act. This is what we intend to investigate for the rest of the summer.

As I mentioned in our testimony, our findings insofar as the pharmaceutical industry is concerned, are preliminary findings. I might also mention, just to stress a point made by Professor Stevenson, that our research is identifying one cost of the Freedom of Information Act. It is a cost that should be weighed against possible benefits that might be created by this legislation. The identification of this cost does not automatically imply that the legislation ought to be changed. It is one cost that we feel has been overlooked, but one that should be considered if Congress decides that proprietary business information may be disseminated.

Mr. RADER. Did you run across any particular economic benefits of the Freedom of Information Act?

Mr. MARTHINSEN. As part of our testimony, we mentioned that most of the economics profession has been concerned with allocative efficiency in a static economy. In such an economy, the free dissemination of proprietary business information is going to increase competition and thereby reduce prices. This is a measurable benefit accruing to consumers.

We are concerned with dynamic process allocative efficiency and the creation of incentives to generate the information that will be used later on. Therefore, in a static sense, dissemination of more information is unequivocally good. However, in a dynamic sense, it does create some problems with incentives.

[The prepared statement of Mr. Marthinsen follows:]

PREPARED STATEMENT OF JOHN MARTHINSEN

The Freedom of Information Act, Entrepreneurship and the Innovative Vitality of the U.S. Economy

Introduction

I am John Marthinsen, Professor of Economics at Babson College in Wellesley, Massachusetts. With me is Dr. William Casey, a coresearcher and the Chairman of Babson College's Economics Division. Dr. Laurence Moss, the other member of our research team, extends his regrets to the Committee that he could not be here today for the presentation of this report.

Babson College is a private, coeducational college that prepares students for careers in management and in entrepreneurial ventures. It offers both Bachelor of Science and Master of Business Administration degrees. Babson College has a commitment to encourage the "spirit of entrepreneurship" and to encourage research in the areas of innovation and venture capital.[1]

The testimony I will present today is based on the preliminary findings of Professors William Casey, Laurence Moss and myself under a research grant administered by the Babson College Board of Research.[2] Portions of this study were completed and their findings were presented at the Philadelphia meeting of the Eastern Economic Association in April 1981.

Our investigation of the Freedom of Information Act is part of a larger research effort about information flows, technology transfers and the protection of proprietary information. This investigation builds upon an earlier study that we conducted concerning the relationship between patents and trade secrets.[3] A number of analysts have pointed to the decline in the value of patent protection due to a negative attitude of some Federal court judges with regard to the rights of patent holders.[4]

© William Casey, John Marthinsen and Laurence Moss, 1981.

Yet, in a study of 13 high technology firms in the Greater Boston/Route 128 industrial complex, we were able to document only one case where a company was redirecting its protective efforts away from patents and toward trade secrecy. Trade secrecy is usually considered a substitute for patenting as a method for carving out a market segment and exploiting it. It was much to our surprise that we did not detect a strong substitution effect between these two methods of retarding the diffusion of inventions. These results indicate that patent protection was not falling out of favor or weakening relative to trade secrecy despite the dimunition in the perceived value of patents. One possible explanation for these findings was that trade secrets were also becoming less valuable along with patent protection. But for what reason?

We discovered that nearly every one of the 13 companies we interviewed had substantial contract work with the government and nearly every one had commented on the negative impact which government regulations had on their entrepreneurial strategies. One defense-related company mentioned that it was required to conduct an industry-wide demonstration of its technology as a prerequisite to its being considered for a government contract.[5] In another case, a company felt threatened by the passage of the Toxic Substances Control Act of 1976 which required that a detailed list of the substances used in its production process be submitted to the EPA. The company's existence was (and still is) based on a trade secret which could be discovered if competitors only had knowledge of the substances used in its process. Submission of this information to the government and its likely disclosure via the Freedom of Information Act appeared to be an unacceptable risk for the company. It sued and was granted special protective custody for its chemicals in Washington, D.C. and the government

was enjoined from disclosing that information. The Freedom of Information Act thus provided a good starting point for our continued investigation of the paradoxical results in our earlier study.

Circumstantially Relevant Business Information

The Freedom of Information Act (FOIA) was passed in 1966 to make unequivocally clear that people have a "right to know" about their government and especially about the government decision-making processes.[6] It is a statute that traces its heritage to statements made by some of our earliest and most ardent advocates for open government such as James Madison.

Both Congress and the courts have consistently interpreted FOIA as a disclosure statue; its nine exemptions are at the discretion of government agencies as the Chrysler decision determined in 1979.[7] It is clear, nevertheless, that exemption (b)(4), the focus of our attention today, was included in the Act precisely to prevent the release of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[8] Congress did not pass FOIA to aid in the dissemination of proprietary business information.[9] Yet, this seems to be one of the unintended and perhaps undesirable byproducts that has accompanied the worthy goal of pursuing a more open government.

Our claim is that there exists a body of knowledge that is vital to the exercise of entrepreneurship, but which has been generally overlooked by the legal, Congressional and administrative interpretations of exemption (b)(4). This body of information has consistently been ignored by social scientists.[10] We call this information "circumstantially relevant business information" (CRBI).[11] CRBI is not the sort of information that would appear in an engineering text or constitute a patentable invention.

According to current legal terminology, it would come under the heading of "trade secret"[12] or "know how"[13] and yet, in most cases, it is not a technical formula or secret process. It is not the type of information that would be deemed important by the scientist, engineer or technician and it would probably go unnoticed by the media and casual observer. Rather, CRBI is "knowledge of a particular time and place."[14] The existence of this information is important to this Subcommittee because its disclosure tends to erode competitive advantage and therefore to discourage further entrepreneurial activity.

CRBI consists of knowledge of where bargains can be found, knowledge of whom to contact in large organizations, knowledge of the cheapest mode of transportation, knowledge of unsatisfied demands and the means of satisfying them, knowledge of the true risks as compared to the perceived risks of an innovation; it is knowledge of how to design a laboratory test on a new class of compounds. It includes knowledge of where resources are believed to be undervalued and where resources are believed to be overvalued. This knowledge, while innocuous and mundane to federal executives, may be of immense importance to competitors of information submitters. This information may not be "the product of human design" and often people stumble upon it much like scientists stumble upon research results.[15] Frequently, it is fragmented and its economic value difficult to assess. The loss of any one piece of this information may not cause significant and statistically quantifiable harm to society or perhaps this firm. Yet, this information is essential to the impersonal decision-making processes of a free society. It is the means by which a nation can continuously and incrementally devote resources to ventures of varying risks and returns without over-committing

resources to any one venture. Karl Popper referred to this trial and error process that we identify with competitive markets as "piecemeal planning."[16] It is the underlying current which provides direction and a broad-based foundation for the application of scientific discoveries.

The dynamics of our economy may be viewed as a multitude of opportunities which are opened and closed with passing events. The key to success is not only the availability of opportunities, but in the identification and seizing of these opportunities by entrepreneurs.[17] The largest rewards are sometimes returns to the simplest of insights -- but insights which are self-evident only in the light of the new perspective created by the innovator. The gains from these opportunities are uncertain at the time the decision to innovate is made and if they materialize, they will be transitory. Their exploitation requires a lag between commercialization of the invention and imitation by others. This lag offers the innovator a period of time over which to derive a return on his ventures.

FOIA may threaten the discovery and exploitation of this "knowledge of a particular time and place" by reducing the time lag between innovation and imitation. Dramatic proof of competitive harm cannot easily be demonstrated as is now required after the National Parks case,[18] since the loss has to do with an opportunity not taken and decisions not undertaken cannot easily be documented. Yet, ignoring the value of this information is to ignore the very incentives which give rise to new entrepreneurial ventures and the continued growth of productivity in the American economy.[19]

Why have so many economists supported disclosure and deplored secrecy?[20] We recognize that individuals who attended the major universities over the last two decades have been taught the economics of "allocative efficiency." Traditional economics is concerned with the means by

which resources that are assumed to be available in either fixed amounts or more accurately with fixed supply schedules can be allocated to what the consumers consider to be their most highly valued uses. Competitive market processes produce that result while monopoly or monopolistic structures retard it.[21] Hence, the whole effort in the area of antitrust is founded on the ideal of moving resources to their most highly valued uses by breaking up concentrated industries and/or removing barriers to entry. Unfortunately, while the economics profession has concentrated on the economics of static allocative efficiency, it has paid insufficient attention to the dynamic processes of innovation and entrepreneurship that lead to the discovery and creation of new resources.

Knowledge of particular relevance to entrepreneurial action may exist in virgin form, yet few individuals may care to utilize that information unless financial incentives exist for doing so. The "trade secret" remedy has acted as a device to encourage individuals to exploit a discovery and continue to do so by enjoining anyone who tries to commercially exploit that secret by unlawful means.[22] For any particular bit or piece of information already being commercially utilized, one can argue that its disclosure would speed resources to their most highly values uses by making competition more complete. But disclosure policies of this type are short-sighted. They are based on the static efficiency idea that once resources are created the problem is how to allocate them. We believe that the most important problem facing any economic system, especially a productive and innovating one, is how to slow down the diffusion of CRBI. It is not enough to assume that the economic problem begins with given supplies of resources that have to be distributed. Rather, the

problem is how to encourage individuals to develop precisely the information that will prove valuable later on. It is a "supply side" incentive, the purpose of which is to encourage others to grasp this knowledge of particular situations and utilize it.

The Pharmaceutical Industry: Some Preliminary Insights

We decided to see if we could find evidence of the negative impact of FOIA on the pharmaceutical industry of the United States. It is one of the most heavily regulated industries in the U.S. and the FDA is one of the most heavily-used agencies for FOIA requests.[23] After the liberalization of FOIA in 1974, FOIA requests on the FDA increased by 989%.[24] From 1976 to 1979, the FDA's requests continued to grow at a 13% annual rate -- a rate that, if continued, would double requests approximately every six years.[25] Moreover, the requests have increasingly been made through third-party intermediaries. In 1976, 34% of all FOIA requests made to the FDA were made through FOIA-service companies;[26] in 1979, this figure rose to 40%.[27] We are concerned with the nature of the information being requested, the use to which it is being put and the effect which it has had on the pharmaceutical industry.

In the course of our investigation, we conducted an extensive literature search, interviewed representatives of the pharmaceutical industry and interviewed government agency employees concerned with implementing FOIA. Our preliminary findings are as follows:[28]

(1) There is a wide gap between the perceptions of the pharmaceutical industry in regards to FOIA and the perceptions of government agency representatives.

We found the pharmaceutical industry to be philosophically opposed to the provisions within FOIA that allow for the release of information that would otherwise not be disclosed. Industry spokesmen were not convinced that the government was protecting their proprietary information. In one case, a spokesman assumed all information revealed to the government was disclosed. Despite this clearly articulated position, industry representatives were unable to cite actual evidence of unauthorized information disclosure through FOIA. They suggested, however, that the lack of "horror stories" was not prime facie evidence that none existed. Rather, it suggested an inability to track them down through third-party requestors.[29]

In light of this evidence, FOIA enthusiasts, such as consumer interest groups, have discounted the importance of unsubstantiated business perceptions. Our view is that these perceptions are important. It is upon these perceptions that decisions to innovate are made. If there is a communication gap between businesses and government agencies it ought to be bridged. An increasing portion of our GNP is being devoted to the dissemination of information through FOIA and to business efforts to protect such information which has been made more vulnerable by this same statute.[30] In the end, we must question whether these resources couldn't be better spent elsewhere.

(2) Federal regulations in general and FOIA in particular may be altering the product life cycle of the pharmaceutical industry to the disadvantage of the U.S.

Figure 1 depicts the various stages of a product which is developed domestically and subsequently exported.[31] The product life cycle theory (PLC) explains how an innovating firm develops new products and immediately capitalizes on them. At this early stage, there is a great reliance on

patent and trade secret protection. If successful, this company will gain market dominance at home and begin to export abroad (Phase I).

As the innovation becomes disseminated, the technology gap between the inventor and competitors becomes less important; production costs, distribution costs, and trade barriers become more important determinants of trade. Plants are located abroad by U.S. companies and by foreign nationals. U.S. exports to countries in which production facilities are built decline, but remain strong in third world countries where the ability to absorb and assimilate new technologies is limited (Phase II).

Eventually, the U.S. loses its export dominance in third-world countries (Phase III), begins to import these goods from industrialized countries (Phase IV) and ultimately, imports from third-world countries (Phase V). By now, the technology which launched the product life cycle has become disseminated throughout the world and the product has become standardized.

The PLC model, where it applies, is important because it shows that comparative cost advantages in high technology areas are transitory. They depend on an information diffusion lag in order to cover investment costs. Presumably, a reduction in this lag would reduce the level of investment, reduce U.S. exports and thereby reduce the international value of the dollar. Disincentives might also shift the sequence of the cycle. In either case, the results are the same.

We believe that there is some evidence that the pharmaceutical industry is displaying signs of such a shift. Table 1 shows that the U.S. has enjoyed a healthy and steady growth rate in pharmaceutical exports, but this growth masks the fact that many of these exports are ingredients and intermediate products for further packaging and/or processing abroad.[32]

Increasingly, world demand is being satisfied by the production facilities abroad. While the export of raw materials from patent companies is not unusual in the PLC model, the U.S. transition through the PLC could very well be influenced by the impact that relatively stringent U.S. testing, reporting and regulatory requirements have on the pharmaceutical industry. Although such requirements have clear advantages, we should not be blind to the cost they impose as well.

Additional evidence of the shifting PLC can be extracted from the changing patterns of research and development (R&D) in the pharmaceutical industry. From 1963 to 1978, foreign R&D expenditures increased from 7 % to 18.1%.[33] Moreover, the share of U.S.-company-funded R&D conducted overseas more than doubled in the ten years ending in 1978.[34] R&D lies at the foundation of the PLC. It is with the creation of a technology gap that the PLC begins. If comparative international cost advantages and export strength require continuing technological superiority, these developments are indeed ominous.

We suggest that the sequence of the PLC might be changing in such a way that innovations discovered by U.S. companies are produced and sold abroad before they are produced and sold in the U.S. (see Figure 2). Thus, Phase I is one of foreign dominance and no U.S. production or importation. During Phase II the product, already successfully market tested abroad, is imported into the U.S., subject to U. S. regulatory approval. If, eventually, the U.S. market has comparative cost advantages, production facilities might be located in the U.S.; but, since the pharmaceutical industry is "foot-loose" and transportation costs are likely to be insignificant in comparison to the final value of the products, this is unlikely (Phase III).

Finally, if facilities do locate in the U.S., exports are possible (Phase IV). They are not a certainty. Thus, the fruits of innovation, namely, the ability of the U.S. to enjoy a strong export position, may be choked off by government regulation.

It is our position that the U.S. Freedom of Information Act and the absence of similar legislation overseas explains in part this abnormal product life cycle pattern for U.S. pharmaceutical products. Initially, U.S. drugs are researched, developed, and marketed overseas because of less stringent testing requirements and because of the greater likelihood of maintaining trade secrets in the absence of FOIA-type legislation. Early importation into the U.S. is discouraged because this would require increased FDA-dictated testing, which, in turn, would mean additional data submissions to that agency, thereby promoting the possibility of information leakages through FOIA. Importation into the U.S. would be delayed until the product has been fully developed and market tested. Only then would the innovating firm risk potential FOIA disclosures because its significant market lead over potential rivals at this point would guarantee an adequate investment return on R&D expenditures.

Conclusions

The challenge facing Congress is to revise the Freedom of Information Act in such a way as to eliminate the social costs which it has created without discarding its social benefits in the process. No one would argue against the proposition that "open" government is one of the cornerstones of our country's democratic political system. However, one of the cornerstones of our economic system is the principle of property rights. It is our contention that Freedom of Information legislation unintentionally has violated this latter principle. Evidence in support of the position that FOIA has spurred industrial espionage is convincing.

It would be unfair to conclude, however, that Congress and the courts have been blind to these realities. Attempts have been made to identify those types of business information (trade secrets, confidential information of a financial or commercial nature) which, if released by government, would produce competitive harm. In effect, attempts have been made to draw a line of demarcation between those types of information which may be disseminated freely without harming the submitter and other types which should be protected. It is our contention that the line is drawn improperly.

Our research has led to the identification of a special type of information i.e., "circumstantially relevant business information" which has been generally overlooked by both friends and critics of FOIA alike. CRBI, defined as knowledge of a particular time and place, is generated by the dynamics of entrepreneurial activity. Legally it fits within the broad definition of "trade secrets" yet because of its non-technical nature, CRBI is precisely the type of proprietary information which slips through the cracks of the (b)(4) exemption of FOIA.

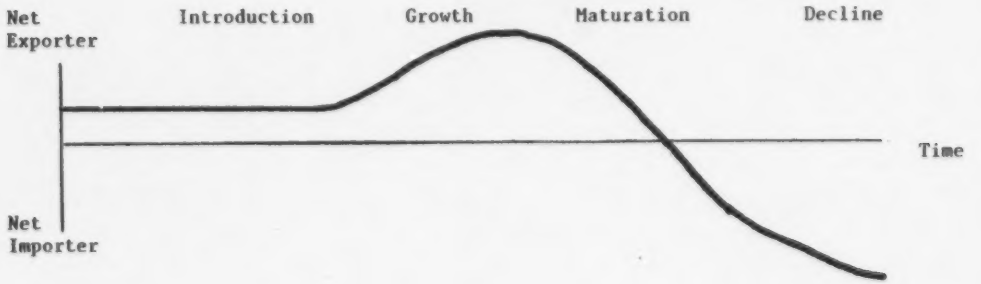
It is our concern that innovation and entrepreneurship in the U.S. economy will be discouraged by the inability of private firms to guard against the disclosure of CRBI by government agencies. As the time lag between innovation and imitation becomes shorter, the opportunity on the part of the innovating firm to capture sufficient investment returns to cover R&D costs is likewise reduced.

The long-term effect on the entrepreneurial spirit and performance of the U.S. economy may be just as damaging as if government released with regularity the secret formulas or product blueprints of high technology firms.

Figure 1*

The Product Life Cycle Model of International Trade

The U.S. (Innovator) Trade Position in the Product Life Cycle Model



Key Considerations	Phase I	Phase II	Phase III	Phase IV	Phase V
Location of most competitive plants	U.S.	U.S., but European or Japanese production begins	Europe or Japan	Europe or Japan	Less developed
Exporter	U.S. exports to many countries	U.S. exports mostly to LDCs	Europe or Japan export to LDCs and replace U.S. exports to LDCs	Europe or Japan export to U.S.	LDCs export to U.S.

Source: Y, Tsurumi, Multinational Management: Business Strategy and Government Policy. Cambridge, Mass.: Ballinger Publishing Company, 1977, p. 13.

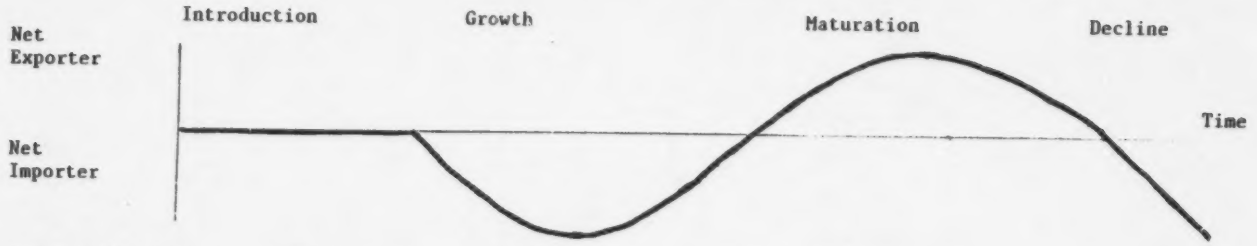
*Reproduced from W. Casey, J. Marthinsen and L. Moss, "Productivity, Research and the Freedom of Information Act," paper presented at the Philadelphia meeting of the Eastern Economic Association in April 1981.

Figure 2*

The MCM Product Life Cycle Model of International Trade

The U.S. Trade Position in the Product Life Cycle Model

Stages of Product Life Cycle



Key Considerations	Phase I	Phase II	Phase III	Phase IV	Phase V
Most profitable Plant Location	Europe/Japan (specifically those countries which host subsidiaries of U.S. pharmaceutical companies)	Europe/Japan (specifically those countries which host subsidiaries of U.S. pharmaceutical companies)	Europe/Japan, but production begins in the U.S.	U.S.	Lesser Developed Countries
Exporter	Europe/Japan export to other industrialized countries (excluding U.S.) without U.S. pharm. subsidiaries	Europe/Japan export to other industrialized countries (including U.S.)	Europe/Japan export mostly to LDCs	U.S. exports to Europe/ Japan	LDCs export to U.S. and to Europe/Japan

*Reproduced from W. Casey, J. Marthinsen and L. Moss, "Productivity, Research and the Freedom of Information Act," paper presented at the Philadelphia meeting of the Eastern Economic Association in April 1981.

TABLE 1*

NUMBER OF NEW US PATENTS ON DRUGS & MEDICINES
1963-1977

Years	Total Patents	Originating in the US	Originating Elsewhere
1963	1532	1034	498
1964	1802	1180	622
1965	1865	1182	683
1966	2552	1703	849
1967	2438	1637	801
1968	1664	1164	500
1969	2630	1654	976
1970	2537	1596	941
1971	2417	1509	908
1972	3843	2292	1551
1973	3166	1817	1349
1974	3795	2059	1736
1975	4395	2476	1959
1976	4720	2448	2272
1977	4168	2235	1933

Source: US Patent & Trademark Office, Office of Technology Assessment, and PMA Fact Book, 1980 edition.

*Reproduced from W. Casey, J. Marthinsen and L. Moss, "Productivity, Research and the Freedom of Information Act," paper presented at the Philadelphia meeting of the Eastern Economic Association in April 1981.

Footnotes

1. Babson College Catalogue, 1979-81, p. 8.

2. William Casey, J. Marthinsen and L. Moss, "Productivity, Research and the Freedom of Information Act," paper presented to the Eastern Economic Association, Philadelphia, PA, April 1981.

3. William Casey, J. Marthinsen and L. Moss, "Trade Secrecy and Patents: Complementary or Substitutable Activities?", paper presented to the Atlantic Economic Society, Washington, D.C., October 1979.

4. See for example, "Long Life to Patents," The Wall Street Journal, 28 May 1981 and Arthur H. Seidel and Ronald L. Panitch, What The General Practitioner Should Know About Trade Secrets and Employment Agreements (Philadelphia: American Law Institute, 1972), p. 119.

5. The Department of Defense's motive here was to protect itself against buying from a sole source. The company itself had to weigh the risk of losing a lucrative contract against substantial losses of expected future revenues due to disclosure of its trade secrets.

6. 5 U.S.C. § 551.

7. Chrysler v. Brown 99, Sct. 1750 (2d Cir. 1979).

8. 5 U.S.C. § 552 (b)(4)(1976).

9. See W. Casey, J. Marthinsen and L. Moss, "History of FOIA (manuscript 1980); James T. O'Reilly, Federal Information Disclosure: Procedures, Forms and the Law (Shepard's/McGraw-Hill Co. 1980).

10. See, L. Moss, Critical Review of Corporations and Information: Secrecy, Access and Disclosure by Russell B. Stevenson, Jr. Journal of Economic Literature, Vol. XIX, No. 2, June 1981, p. 605.

11. In a previous paper entitled "Productivity, Research and the Freedom of Information Act" we defined a broad class of information vital to entrepreneurship called "entrepreneurially relevant business information" (ERBI). ERBI contains information that is broader than the commonly used definition of trade secrets, but narrower than the set of information which, if revealed to competitors, would cause competitive harm. CRBI is a subset of ERBI.

12. The usual definition of a "trade secret" comes from the 1938 Restatement of Torts, § 757, comment b (1938).

13. See Francois Dessemontet, The Legal Protection of Know-How in the United States of America (translated by H. W. Clarke), (Geneva and Fred B. Rothman & Co.: South Hackensack, NJ) 1976.

14. We are very much indebted to the pioneering work of F. A. Hayek on whose work this paper is, in large part, based. See Friedrich A. Hayek, "The Use of Knowledge in Society," American Economic Review (September 1945): pp. 519-530. Also see Thomas Sowell, Knowledge and Decisions (New York Basic Books, 1980).

15. Ibid.

16. Karl Popper, The Open Society and Its Enemies (University of Chicago Press, 2 volumes, 1962).

17. Israel Kirsner, Competition and Entrepreneurship, (University of Chicago Press, 1973).

    Israel Kirsner, Opportunity and Profit, (University of Chicago Press, 1979).

18. National Parks and Conservation Assn. v. Morton 498 F2d. 765 (D.C. Cir. 1974). National Parks and Conservation Assn. v. Kleppe 547 F2d 673 (D.C. Cir. 1976).

19. W. Casey, J. Marthinsen and L. Moss, "Businesses Move To Get Low-Cost Government Information about Competitors," The Collegiate Forum. (Dow Jones & Co.) Fall 1980.

20. This view has been supported by many economists. For an early reference see Alfred Marshall's classic text entitled Principles of Economics.

21. See Burton H. Klein, Dynamic Economics (Cambridge, Harvard University Press, 1977), pp. 68-140.

22. See Roger Milgrim, New York, Trade Secrets (1976).

23. Paul J. Quirk, "Food and Drug Administration," in James Q. Wilson, ed., The Politics of Regulation, (New York Basic Books, 1980), pp. 191-235; Robert I. Chien, ed., Issues in Pharmaceutical Economics (Lexington Books, 1979); David Schwartzman, The Expected Return From Pharmaceutical Research (Washington, American Enterprise Institute, 1975).

    Pracon, Inc., "Study of Assess Impacts of Releasing Safety and Effectiveness Data on the Pharmaceutical Industry's Incentives to Invest In and Conduct Research and Development Programs," Pracon Incorporated, Vienna, VA, Contract 223-77-8052.

24. D. Montgomery, A. Peters and C. Weinberg, "The Freedom of Information Act: Strategic Opportunities and Threats," Sloan Management Review, Winter 1978, p. 3.

25. W. Casey, J. Marthinsen and L. Moss, "Productivity, Research and the Freedom of Information Act" paper presented to the Eastern Economic Association, Philadelphia, PA, April 1981.

26. "More Business Data from Government Files," Business Week, July 20, 1974.

27. Casey, et al. Ibid.

28. Extensive interviewing was conducted with five (5) U.S. pharmaceutical firms with net annual sales ranging from $1.3 billion to $2.7 billion (1979). Anonymity was requested by two firms as conditions for their cooperation and participation in the study; therefore, the decision was made to extend anonymity to all.

29. Stevenson offers several other explanations for the lack of reported "horror stories." Russell B. Stevenson, Jr., "Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4" (manuscript prepared for Administrative Conference of the United States, 1980), Contract No. T-15706548, 00.923.9.97510.251, p. 25-26.

30. See Memorandum for: Heads of All Federal Departments and Agencies from William French Smith, Attorney General on the Freedom of Information Act, 4 May 1981.

31. See Louis T. Wells, ed., The Product Life Cycle and International Trade (Boston, Harvard University 1972) and W. Tsurumi, Multinational Management: Business Strategy and Government Policy (Cambridge, MA: Ballinger, 1977).

32. Tsurumi, Ibid and Pharmaceutical Manufacturers Association, Prescription Drug Industry Fact Book, Washington, D.C., 1980.

33. Pharmaceutical Manufacturers Association, Ibid, p. 28.

34. Ibid. Also see Henry G. Grabowski, John M. Vernon and Lacy Glenn Thomas, "Estimating the Effects of Regulation on Innovation: An International Comparative Analysis of the Pharmaceutical Industry," The Journal of Law and Economics, Vol. XXI (1), April 1978, p. 133-164. FOIA is cited as one of the causes of the pharmaceutical industry's shifting its R&D overseas in Willam J. Broad, "Dollars For Drug Research Flow Overseas," Science, Vol. 205, No. 4410, 7 September 1979, p. 979-980.

Mr. RADER. Thank you very much.

Do you have anything to add, Dr. Casey, in conclusion?

Dr. CASEY. I just wanted to add that we agree completely with Professor Stevenson that if technology were a free good, or if we lived in a static economy, it should be freely and fully disseminated. Our concern is with the creation of new technologies. We believe that the FOIA is producing disincentives in that regard.

Mr. RADER. Thank you.

We appreciate your coming a great distance to present excellent testimony on the economic aspects of the Freedom of Information Act. We would advise you, as we have advised the other witnesses, that there is a potential for subcommittee members, not present here today, to have questions, after they have had a chance to review your testimony, and they might submit those in writing.

Mr. MARTHINSEN. We would be glad to respond.

Mr. RADER. We appreciate very much your attendance here today. With that, the subcommittee will close this first day of hearings on FOIA.

[The subcommittee was adjourned at 12:30 p.m.]

FREEDOM OF INFORMATION ACT

WEDNESDAY, JULY 22, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch, Thurmond, and Grassley.

Staff present: Randall Rader, counsel; Dickson Burton, law clerk; Peter Ormsby, professional staff assistant; Claire Greif, clerk; and John Kohut, staff assistant.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The hearings will come to order.

Today we convene the second of a series of hearings on the Freedom of Information Act.

We started these hearings a week ago with the general overview of the issues relevant to a legislative reconsideration of the act. We took testimony that showed the act in general operated very well.

It has done much to promote openness in Government. It has worked well, and I think has made Government more accountable to the public.

However, even though it has been working well, there are some critical areas where it has impaired important Government functions.

In the next 2 months, we will be looking more closely at areas where some adjustments of the Freedom of Information Act might be in order. Specifically, we will look at how law enforcement and intelligence functions are affected by FOIA.

Law enforcement agencies are required to answer requests from convicted felons seeking their investigative records, personnel rosters, and investigative manuals. Much of this information is available upon request under FOIA.

A full 40 percent of the requests handled by the Drug Enforcement Administration are from convicted felons, many of them seeking this information to aid them in their criminal activities or to help identify informants that helped convict them.

With law enforcement agencies bombarded by FOIA requests, informants are understandably reluctant to cooperate for fear that they might be discovered. Moreover, the sharing of information

between State and local governments and Federal law enforcement agencies has been seriously hampered.

The CIA has testified that foreign intelligence sources hesitate to share critical information with our intelligence officers, due to a widespread belief that the U.S. Government is incapable of protecting its secrets because of the Freedom of Information Act.

In September, we will be looking closely at the national security exemption of FOIA to determine what adjustments should be made.

Today our focus is on another critical issue of the Freedom of Information Act.

When it was originally enacted, exemption 4 was included to protect confidential business information and trade secrets.

The 1966 Senate report described the confidential information as that "which would customarily not be released to the public by the person from whom it was obtained."

This test was used by the courts in the early decisions addressing the question and recognized that no one knows better than the submitter what information is actually sensitive.

However, in *National Parks and Conservation Association* v. *Morton* the court created its own competitive harm test. No longer does the Government look solely at what the information means to the submitter but instead weighs whether disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained.

This judicially created standard does not adequately protect a submitter of information. Consequently, it has multiplied the number of reverse-FOIA suits, or suits to protect commercial information from disclosure.

Not only was the standard for exemption 4 diluted by judicial innovation, but the courts left businesses without adequate procedural protection for their confidential information.

The Supreme Court in *Chrysler Corporation* v. *Brown* held that the Freedom of Information Act provides no remedy in the courts for a person objecting to release of his confidential information.

Instead, an individual can only proceed under the Administrative Procedures Act which would subject him to unpredictable procedures of each distinct agency.

This case leaves submitters without even an opportunity to file an effective reverse-FOIA suit.

As a result of the confusion surrounding exemption 4, thriving new businesses specializing in industrial espionage have arisen to exploit FOIA. Indeed, 85 percent of the requests received by FDA, and more than three out of five received by all the other agencies, come from these firms or other businesses or lawyers.

Accordingly, we are here today to more closely examine the questions surrounding exemption 4 of the Freedom of Information Act. Senator Dole has introduced S. 1247 to address some of the problems I have mentioned.

It would require the agencies to notify a submitter when disclosure of his information has been requested, and it would allow him to voice any objections to its disclosure.

S. 1247 would also amend exemption 4 to return to the standard which Congress originally intended which protects information not customarily disclosed by the submitter.

Finally, the submitter is given a right to denovo judicial review of an agency decision to release his information.

We plan to take a close look at S. 1247 in addition to other legislation before the subcommittee as we examine the issues surrounding exemption 4.

Without objection, we will enter the statements of Senator Bob Dole and Senator Dennis DeConcini into the record at this point.

[Material follows:]

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STATEMENT OF SENATOR BOB DOLE

MR. CHAIRMAN, THE SENATOR FROM KANSAS WHOLEHEARTEDLY COMMENDS THE SUBCOMMITTEE ON THE CONSTITUTION FOR HOLDING HEARINGS ON S. 1247. AS SPONSOR OF THE BILL, THE SENATOR FROM KANSAS LOOKS FORWARD TO THE EXPEDITIOUS PASSAGE OF S. 1247, WHICH TODAY'S HEARINGS SHOULD HELP ENSURE.

S. 1247, THE PRESERVATION OF CONFIDENTIAL INFORMATION ACT, WAS INTRODUCED BY THE SENATOR FROM KANSAS ON MAY 21, 1981, WITH SEVEN CO-SPONSORS, INCLUDING SENATORS HATCH, GRASSLEY, AND DeCONCINI OF THIS SUBCOMMITTEE. THE BILL, AND ITS HOUSE COUNTERPART, H.R. 3928, INTRODUCED ON JUNE 16, 1981, BY CONGRESSMAN HORTON, AMEND THE FREEDOM OF INFORMATION ACT TO CURTAIL INDUSTRIAL ESPIONAGE.

IN APRIL OF 1979, WHEN THE SUPREME COURT HANDED DOWN ITS DECISION IN CHRYSLER CORP. VS. BROWN, I EXPRESSED MY CONCERN THAT THE FOIA HAD IN CERTAIN WAYS BEEN TRANSFORMED FROM A MECHANISM BY WHICH CITIZENS COULD LEARN ABOUT THE OPERATIONS OF THEIR GOVERNMENT INTO AN INSTRUMENT FOR INDUSTRIAL ESPIONAGE.

THIS BILL RESPONDS TO THAT PROBLEM BY AMENDING THE FOIA TO GIVE THE PERSON WHO SUBMITS PRIVATE INFORMATION TO THE GOVERNMENT NOTICE WHEN DISCLOSURE OF THAT INFORMATION IS REQUESTED AND TO GIVE THE SUBMITTER AN OPPORTUNITY TO VOICE HIS OBJECTIONS TO THE RELEASE OF THE INFORMATION. FURTHERMORE, THIS BILL MODIFIES THE FOIA TO REFLECT THE ORIGINAL INTENTION OF CONGRESS THAT INFORMATION NORMALLY NOT DISCLOSED BY THE SUBMITTER SHOULD NOT BE RELEASED BY THE GOVERNMENT THROUGH THE FOIA.

IN SUM, THIS BILL IS NARROWLY DIRECTED TOWARD CERTAIN SPECIFIC PROBLEMS THAT HAVE PLAGUED THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT. THE RESOLUTION OF THESE PROBLEMS IS LONG OVERDUE. THE DRAFTERS OF THE FOIA DID NOT APPRECIATE THESE DEFECTS IN THE STATUTE, AND THIS BILL IN NO WAY UNDERMINES THE PURPOSE OF THE FOIA NOR AFFECTS ADVERSELY THE RIGHTS OF REQUESTERS.

HOPEFULLY, TESTIMONY FROM TODAY'S HEARINGS, WITH WITNESSES FROM THE LEGAL COMMUNITY, BUSINESS, AND PUBLIC INTEREST GROUPS WILL PROVIDE A COMPLETE EXPLANATION FOR THE RECORD ON PROVISIONS OF THE BILL.

MR. CHAIRMAN, THE SENATOR FROM KANSAS APPRECIATES INCLUDING S. 1247 AS PART OF YOUR GENERAL FOIA OVERSIGHT HEARINGS. THESE HEARINGS HELP PROMOTE LEGISLATION, SUCH AS S. 1247 AND S. 586 AND S. 587, INTRODUCED BY THE SENATOR FROM UTAH AND CO-SPONSORED BY THE SENATOR FROM KANSAS, WHICH HELP LESSEN ADVERSE AND UNNECESSARY GOVERNMENT REGULATORY INTERFERENCE. THE SENATOR FROM KANSAS FEELS THAT S. 1247 WILL HELP ENSURE THAT GOVERNMENT REGULATION IS AT ITS BEST AND HOPES THAT TODAY'S HEARING WILL PROVIDE STRONG SUPPORT FOR THE PROPOSAL.

STATEMENT OF SENATOR DENNIS DeCONCINI
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION
HEARINGS ON THE FREEDOM OF INFORMATION ACT

THANK YOU MR. CHAIRMAN, AND I COMMEND YOU FOR ADDRESSING THE COMPLEX ISSUES INVOLVED IN S. 1297 WHICH PROPOSES TO AMMEND THE (B)(4) EXCEPTION TO THE FREEDOM OF INFORMATION ACT.

AS YOU HAVE NOTED, MR. CHAIRMAN, SIGNIFICANT QUESTIONS ARE RAISED BY THE RPOPOSED BILLS ARISING FROM THE CONFLICT BETWEEN THE DESIRABILITY OF PUBLIC ACCESS TO GOVERNMENT DOCUMENTS, ON THE ONE HAND, AND THE NEED OF GOVERNMENT AND PRIVATE ENTITIES TO PRESERVE THE CONFIDENTIALITY OF CERTAIN TYPES OF INFORMATION IN THE POSSESSION OF GOVERNMENT , ON THE OTHER.

THE SECTION (B) EXEMPTIONS TO 5 U.S.C. 552 WERE DRAFTED AS AN ATTEMPT TO RESOLVE THE CONFLICTS BETWEEN THESE COMPETING INTERESTS. THE GOAL OF THESE EXEMPTIONS WAS TO STRIKE A BALANCE BETWEEN THE PEOPLE'S RIGHT TO KNOW, AND THE PRESERVATION OF CONFIDENTIAL INFORMATION, THE DISCOLSURE OF WHICH IS CONTRARY TO THE NATIONAL INTEREST.

SECTION (B) IS NOT PERFECT. ONE OF THE AREAS IN WHICH THERE HAS BEEN FREQUENT ABUSE INVOLVES SECTION (B)(4). THE RESULTING DISCLOSURE OF CERTAIN INFORMATION HAS BEEN BOTH DETRIMENTAL TO THE NATIONAL INTEREST, AND EXTREMELY DAMAGING TO PRIVATE BUSINESS. I BELIEVE THAT THE (B)(4) TRADE SECRETS EXCEPTION IS ONE OF THOSE AREAS IN WHICH FOIA DISCLOSES TOO MUCH INFORMATION TO THE ULTIMATE DETRIMENT OF THE PUBLIC.

THE RESEARCH I HAVE SEEN INDICATES THAT THE (B)(4) EXCEPTION HAS NOT SUCCESSFULLY ACHIEVED ITS PURPOSE IN ITS PRESENT FORM. THERE ARE NUMEROUS EXAMPLES WHERE THE WORK PRODUCT OF BUSINESSES, OFTEN THE RESULT OF YEARS OF RESEARCH AND DONE AT GREAT EXPENSE, WERE SUBMITTED TO THE GOVERNMENT IN COPMPLIENCE WITH FEDERAL REGULATIONS, THAT WERE ULTIMATELY TRANSMITTED TO COMPETITORS UNDER THE FREEDOM OF INFORMATION ACT. WHILE THIS IS A SERIOUS PROBLEM WHEN THE TRADE SECRETS ARE DISCLOSED TO U.S. FIRMS, THE PROBLEM BECOMES CRITICAL WHEN THESE SECRETS ARE RELEASED TO FOREIGN BUSINESS, AS IS OFTEN THE CASE UNDER THE PRESENT (B) (4) EXCEPTION.

MR. CHAIRMAN, I BELIEVE THAT WE ARE IN GENERAL AGREEMENT THAT FOIA IN SOME FORM IS A DESIRABLE AND NECESSARY TOOL IN MAINTAINING GOVERNMENT ACCOUNTABILITY. IT MAY WELL BE THAT THESE PROBLEMS ARE THE PRICE WE PAY TO ASSURE THE FREE FLOW OF INFORMATION. I PERSONALLY BELIEVE THAT WE CAN MAKE SOME ADJUSTMENTS TO THE FOIA

EXCEPTIONS WHICH ALLEVIATE THE PROBLEM AREAS, WITHOUT RESTRICTING THE PUBLIC'S AEILITY TO OBTAIN INFORMATION FROM ITS GOVERNMENT.

THE QUESTION WHICH IS BEFORE US IS WHETHER THE PROPSED REVISIONS BEFORE THIS COMMITTEE ARE PROPER ADJUSTMENTS TO THE CURRENT EXCEPTIONS. I LOOK FORWARD WITH GREAT INTEREST TO THE TESTIMONY TODAY IN THE HOPE THAT SOME OF THE QUESTIONS ABOUT THE CURRENT PROPOSED REVISIONS MAY BE RESOLVED.

MR. CHAIRMAN, BEFORE WE PROCEED, I WOULD LIKE TO SUBMIT FOR THE RECORD A REPORT ENTITLED NEWS MEDIA ACCESS TO FEDERAL TRADE COMMISSION RECORDS AND AN EXPLANATORY LETTER WHICH I RECEIVED FROM OUR COLLEAGUE, SENATOR SASSER.

Senator HATCH. Let me introduce our first panel.

Our hearing today will consist of three separate panels with expertise about confidentiality of business information and FOIA's exemption 4.

The subcommittee looks forward to a very full and enlightening hearing.

I would like to mention for the benefit of all the witnesses and the subcommittee that we have more witnesses than the subcommittee is accustomed to hearing in the brief time we have available today.

Accordingly, we would like to encourage the witnesses to make their oral statements as concise as possible. This will allow time for important question-and-answer exchanges.

We will put the full written statements in the record at the completion of each panel's oral presentation as though fully delivered before the subcommittee this day.

The first panel consists of three leading legal experts on the subject of commercial confidentiality.

Mr. James O'Reilly is author of several books and articles about information law, including the leading case book, "Federal Information Disclosure." Mr. O'Reilly also teaches at the Cincinnati College of Law.

Mr. Burt A. Braverman will follow Mr. O'Reilly. Mr. Braverman is a partner in the Washington law firm of Cole, Raywid & Braverman and is an acknowledged national expert in litigating FOIA cases. He, for instance, argued the pivotal *Chrysler Corporation* v. *Brown* case before the U.S. Supreme Court.

Finally, Mr. Jack I. Pulley, senior attorney with Dow Corning, has an extensive background as a trade secret expert in patent and FOIA litigation.

We welcome you gentlemen to the subcommittee and advise you that your entire written statements will be made part of the record. Again, I urge you to make your oral statements as concise as you possibly can.

If you will please come to the witness table, we will begin.

Let me also state at the beginning that I am vice chairman of six reconciliation conferences which have been going on from morning

until late night every day. I have to be over on the House side for all of the health programs of this country for budget reconciliation consideration.

I am going to have to ask staff to take the testimony and to make this record today, which is a very important record to make.

I believe Senator Thurmond will be here around 10:30 to personally listen to some of the testimony.

I apologize to you, but it is just that time of the year. There are 68 or 69 of us in the Senate on these reconciliation conferences. I suppose I am on more of them than any other Senator, so I do not have much choice other than to be there.

Thank you for being here. We appreciate the effort you have put forth. We appreciate your written statements and will certainly read your oral statements here as well today.

Thank you so much.

Mr. RADER [acting chairman]. Mr. O'Reilly.

STATEMENT OF JAMES T. O'REILLY, SENIOR COUNSEL, PROCTER & GAMBLE CO., CINCINNATI, OHIO

Mr. O'REILLY. I am James O'Reilly, senior counsel for Procter & Gamble, lecturer in law at the University of Cincinnati College of Law, and author of several books and articles on information law issues.

I am pleased to appear today with Jack Pulley, senior attorney for Dow Corning, and Burt Braverman, partner in the Washington law firm of Cole, Raywid & Braverman.

These are historic hearings—hearings which build on a remarkable record.

We have been a very open society, but one which has been responsible in its openness not to infringe on legitimate private rights.

I know from my travels and from my research that we have the most ambitious freedom of information laws in the world and the most progressive attitude in balancing disclosure and private rights.

I applaud the subcommittee's sincere interest in restoring balance where the 15 years since enactment have shown us shortcomings in our Freedom of Information Act.

In my judgment, the most significant testimony that the subcommittee has heard was last Wednesday's presentation of an economics report card on the Freedom of Information Act by professors from the economics department of Babson College.

They were working without financing from the business community and with the independence of peer evaluation. They unveiled for this subcommittee a carefully researched conclusion that the business data disclosure aspects of the Freedom of Information Act have been harmful for the dynamic competition on which our Nation's economic growth depends. Their charts and conclusions are part of the record of these hearings.

In reviewing them, I found that they matched the concerns about disclosure of private business information which I have heard from many people west of the Potomac. These economic concerns support S. 1247 and support especially a change in our substantive standard of protection for private business information.

FAR-REACHING CONCERNS

The subcommittee will hear disagreements on the issue of commercial confidentiality, as it will on all other aspects of the Freedom of Information Act.

Washington-based advocates particularly, who favor the dissemination of more private data, will support the District of Columbia circuit's demand that an owner of private business data must prove substantial harm to competitive position.

Many of us outside of Washington question why a business secret cannot just remain confidential when it is shared with an agency but why it is only secret so long as the degree of damage is so bad that there is substantial harm.

Telling the manufacturer in Utah or Ohio: "You might be hurt but you are not hurt that badly, so your secret is therefore disclosable," might be logical to some here, but it does not play well west of the Potomac.

Concern about the Government's inability to keep a secret has spread very far.

For example, when the first U.S. Government inspector landed in Shanghai, mainland China, earlier this year for an inspection of a Chinese pharmaceutical plant, the Chinese managers told the U.S. inspector that "they were most concerned about the possibility of their technical secrets being disclosed through Freedom of Information Act disclosures."

If the word has gotten out that far, to the extent that there is suspicion of our own Government's reliability, then we do indeed have a problem.

SUBSTANCE AND PROCEDURE

I would like to cover three procedural aspects of S. 1247 and explain why I and others in the business community endorse the legislation. Unless there are changes in both the standard for keeping information confidential and the procedures by which submitters are able to protect their information, then we will not be able to restore the balance to the Freedom of Information Act field.

S. 1247 requires that an agency give notice to the submitter before information is disclosed by the agency in response to a Freedom of Information Act request. Current law does not require notice, though constitutional due process and many individual agency rules would suggest that notice should be given.

Notice that a valuable property right is being taken and given to a competitor or someone else by an agency is basic to all of American administrative law, except in the area of submitted data under our present Freedom of Information Act. I would like to give an example from my own experience.

A TYPICAL INCIDENT

My client is a relatively new and small participant in a surgical products field regulated by the Food and Drug Administration.

The FDA testified before the Senate Judiciary Committee in 1977 that FDA does not give notice before disclosure of private commercial data. FDA has maintained that view.

In mid-1980, all the firms in this particular product line were looking for a particular chemical that could be used for particular use in treating sterilized surgical products.

Our laboratory researched and found a safe chemical, already used in other FDA-approved uses, which would not be apparent to competitors and which was not patentable.

This trade secret treatment process was submitted to the FDA with special precautions. My letter claimed confidentiality. It asked for notice before disclosure. It gave several phone numbers the FDA could call if the FDA had a question.

Appropriate procedures were followed. We marked the document. We bracketed the secret; we claimed confidentiality. We attached a public release copy with blanked out spaces where the identity would have been omitted. Every precaution was taken.

I learned to my chagrin, from my technical staff, that FDA then responded to a competitive requester's Freedom of Information Act request by disclosing the entire package—the confidential and the nonconfidential portions—with no notice whatsoever. If we had known of the pending disclosure, we would have pointed out the mistake.

The competitor got our technology, and we got a nice letter of apology from the FDA.

However, if notice were in the statute, that incident would not have occurred. The same technical people also told me on July 10 that one of our products which is not yet on the market, which is properly claimed confidential, had likewise been disclosed in a public list distributed by the FDA. That list disclosed our name, the trademark name, and the new type of product which we planned to market in the future.

Again, notification could have prevented that.

We believe that notification should be a statutory right, and we support S. 1247.

RIGHT TO PREDISCLOSURE MEETINGS

A second procedure which merits change is the right to discuss sensitive data before it is disclosed. S. 1247 lets the submitter explain to the agency in person why the information is legitimately confidential. It allows the agency to throw the tough questions at the submitter in an informal, prompt session which will weed out the misconceptions which may arise on both sides.

No administrator and no legislator can understand a constituent's business as well as that person can. A few minutes of questions and answers about that business are really better than a few hours of reading formal submissions and responses.

We think that litigation in this area often arises out of misunderstanding. A meeting such as proposed in S. 1247 would save us and the agency from having to litigate. It would be a cost-effective and creative opportunity.

JUDICIAL REVIEW

The fairness of the whole process, and especially the perception that fair treatment will be given, is crucial. S. 1247 chooses to

assure fairness in the judicial review process through equal treatment of requesters and submitters.

Each will have de novo review in court after each has had a chance at administrative review of the initial decision.

Under current law, de novo review is not guaranteed, though most courts have provided it as a matter of fairness.

The alternative which Government agencies have sought from the courts is a review merely on the paper record, which may be as little as three or five letters, and exclusion of the new evidence which would come from a de novo review on the merits.

My research suggests that the better courts will allow de novo review, and that the Justice Department position should be changed to a more realistic assessment of the weaknesses of an agency record in an FOIA disclosure situation.

The Congress should clean up the loose ends in this area of law by giving both submitter and requester the same procedural due process rights on judicial review.

My fellow panelists will be addressing the substantive standards of review, and the improvements made by S. 1247.

However, to get to the point at which the substantive change can be employed, the law should provide these three procedural rights: Notice before disclosure, right to a meeting with the agency, and de novo review.

There are sufficient provisions in S. 1247 for exceptions to fit emergency situations and specific overriding needs for public access. However, most commercial confidentiality questions do not ever get to litigation.

GREATER ATTENTION TO PUBLIC REQUESTS

In June 1981, for example, Suzuki Motors asked EPA for documents that were submitted to the EPA by Toyota. It is unlikely that either company would litigate in the U.S. courts to get information that they would not be able to share under Japanese law.

The overriding public need considerations for S. 1247 would receive very careful attention if the kind of competitive intelligence-gathering which Suzuki was doing were not in the act.

As the commercial intelligence-gathering slows down through the stronger test for protection of private data, there will be less of a backlog. Less work will be done by the agencies as a library for foreign and domestic competitors.

Our agencies will then be able to better serve the press and the public at large who are the real intended beneficiaries of the Freedom of Information Act.

As a final personal note, I sincerely want the Freedom of Information Act to work. Over the last 5 years, I have written several thousand pages about it. I have distributed perhaps 3,000 copies of my text.

I believe the act's purpose is as solid and necessary as it was 15 years ago, but its weaknesses in dealing with legitimate private business concerns are clear weaknesses, and they need to be addressed.

It is time to make an historic and constructive change, such as that in S. 1247, to keep improving a very important and very legitimate Freedom of Information Act.

Thank you.

Mr. RADER. Thank you very much, Mr. O'Reilly. We appreciate your testimony.

[The prepared statement of Mr. O'Reilly follows:]

PREPARED STATEMENT OF JAMES T. O'REILLY

THE NEED FOR SUBSTANTIVE CHANGES TO EXEMPTION (b)(4)

The current standard for treating "confidential commercial" information is not the Senate's unanimously-passed provision in the original Freedom of Information Act. A matter of some creative judicial rewriting has taken place, and it is appropriate for these hearings to reconsider that creativity. There were Senate hearings in 1977 as general oversight of the Freedom of Information Act, but no Report was issued after those hearings.

The Senate adopted an exemption which covered matters which were (1) information, (2) obtained from a person, (3) privileged or confidential, and (4) commercial or financial in nature. The Senate Report tied these criteria into what might be called a test of origins, because the custom of the originating person controlled the status within the agency:

> "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." (S. Rep. 813 at 9 (1965))

This origins standard prevailed as courts preferred the Senate Report to the somewhat unusual later wording of the House Report and the Senate language became an operational guideline used by administrative agencies. The words of the Senate Report became frequently-cited material in agency FOI regulations such as the Treasury Department's first regulations, 31 CFR §1.5(a)(4), 32 Fed. Reg. 9562 (July 1,1967).

Other exemptions drew much more litigation and controversy than did exemption (4), and the District of Columbia federal courts became both the volume and precedent leaders for the nation's judicial interpretations of the entire FOIA. In 1974, shortly after it had adopted some controversial views of the law enforcement exemption -- so controversial that Congress reversed the Circuit specifically by its 1974 FOIA amendments -- the same D.C. Circuit considered the (b)(4) exemption, with similar creativity. In addition to the customary confidentiality of the origins test, it held: "A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." That purpose was construed by the court to mean the avoidance of "substantial harm to the competitive position of the person from whom the information was obtained." (National Parks & Conservation Assn. v Morton, 498 F. 2d 765,767, 770 (DC Cir., 1974).

Dissatisfaction with the construction of exemption (b)(4) led Senator Dole to introduce a floor amendment amending the exemption, but Senator Kennedy prevailed upon him not to attach that amendment to the FOIA reform measure which was proceeding through the Senate. (Senate Subcomm. on Admin. Practice & Procedure, Freedom of Information Act Source Book, 94th Cong. 1st Sess. at 353 (1975)) The legislative purpose underlying exemption (b)(4) was the source of Senator Dole's concern as there are "many yet unsettled questions in this area", id. Since the action on this revision attempt was deferred, Congress aired an objection but did not get actively involved in undoing the National Parks decision.

The National Parks test is not the origins test but rather the "degree of damage" test. What matters in that standard is the extent of harm that will be perceived by the administrator or judge as that person tries to predict the consequence of a disclosure. It is important to note that this is a subjective test of an ambiguous term -- "substantial" -- measured by a person who will not have been in that line of business, e.g. a biology-trained field official of the Food and Drug Administration deciding likelihood of displacement in market share of a microwave oven manufacturer, from disclosure of portions of an inspection report on an oven factory, or a generalist administrator deciding the probable market consequence of the dissemination of a letter discussing a future development in chemical technology. This subjectivity is perilous for submitters.

From the submitter's viewpoint, National Parks is the worst of both worlds; the deciding person has to exercise subjective value judgments outside of that person's normal sphere of decision-making, and the submitting person cannot tell in advance whether the information will eventually be released.

From the requester's viewpoint, National Parks offers significant advantages in forcing the owner into an untenable position of surrendering the technology, market plan, etc., or paying the legal and economic experts for an elaborate defense. The requester wins if the submitter or agency fails to establish "substantial competitive harm". The elements are:

(1) the information is confidential in fact;
(2) the information is customarily confidential in the hands of the submitting person;
(3) a market exists for that information;
(4) the owner has a position in that market; and
(5) that position would be substantially harmed by this document's disclosure.

Costs of the "substantial competitive harm" test are significant. I recently found an economic report supporting the owner-submitter claim of "substantial competitive harm" which exceeded 100 pages (Public Citizen v FDA, appendix to motions of manufacturer-intervenors, Civ. 79-1710 (DC DC 1981 pending), copy submitted for Subcommittee files). These economic witness presentations are usually the responsibility of the owner of the commercial data who is usually based outside of Washington. Bringing a defensive presentation into the Washington or New York courts is an expensive operation for a submitter based in another state. As of September 1980, 53% of requesting-disclosure suits had been brought in Washington. Of suits brought by noncommercial plaintiffs, only 2 of 31 were brought outside of the New York-Washington corridor. So most contested "substantial competitive harm" litigation could be expected to have both the cost of generating data and the cost of moving that data to the requester-selected district court. A smaller innovative firm would have to consider these practical barriers to defense of a confidential item before engaging in litigation to protect its property rights in the submitted information. (Statistics taken from ABA Course Book for May 11, 1981 Seminar, "Your Business, Your Trade Secrets and Your Government", Sept. 1980 Justice Dept. case list at pages 13a et seq.) Costs are appreciable for any submitter.

Those private costs of maintaining confidential status under the "substantial competitive harm" test are not shared by a private firm which seeks disclosure. The documents are usually in a known file, can be copied for 10 cents per page, and if withheld, a successful plaintiff under current law may be able to recover attorney fees and costs, 5 USC §552(a)(4)(E). Some have gone so far as to suggest that the owner of the documents should pay the fees and expenses of the person suing for their disclosure (Stevenson, Draft Report "Managing Exemption 4" to

the Administrative Conference, December 1980). That shifting of costs onto the owner would be unacceptable and would tax the defense of one's property. S. 1247 properly rejects that type of compensation to the litigant seeking private data, though current law is unaffected as to agency awards.

Agencies pay for the "substantial competitive harm" test to a far greater extent than they would under a "customary confidentiality" standard with public interest override, such as S. 1247 proposes. First, agency management and counsel will spend more time when requests are received trying to decide market shares, likelihood of changes of market position, significance of the linkage of certain data to competitively sensitive information, and the like. It may be the linkage of a piece of innocuous data to another commercial development which is significant, see Board of Trade v CFTC, 627 F.2d 392 (DC Cir., 1980). For example, timing of a purchase of television time by a marketing firm may be related to increased marketing activity on a new product. Secondly, agencies incur a cost to enforce subpoenas demanding information which is not shared as a result of concern with the agency's inability to protect that data. An agency's ability to assure protection and enforce the assurance is aided by S. 1247, page 10 line 13 adding a new section 552(b)(4)(D). Third, agencies"lose"an indeterminable amount of data because of the perception that it will be lost to competitors if it is shared with that agency. Not receiving that set of information from a private firm means that the operation of the agency program does not benefit from a piece of information which would help. As Executive Order 12291 becomes a larger aspect of rulemaking, collection of data on costs will be a much more sensitive area. The aggregate cost disclosure is not affected by S. 1247 but 1247 will help agencies obtain specific data which can be amassed and aggregated without risk of public availability of the sensitive firm-specific information. That specific data is not customarily available in many cases and the current law does not permit(nonjudicial)enforceable promises of its protection.

Beyond cost are the twin concerns of the submitter about the unpredictability of the "substantial competitive harm" standard, and the unenforceability of protective statutes in light of that vagueness. The standard is unpredictable because each case has examined competitive harms on a unique set of facts with little commonality in the jurisprudence. "Some" harm is not "substantial harm", but the line is drawn by an agency and defended by agency counsel, such as a U.S. Attorney, which has often no acquaintance with that type of market and the utility of that piece of information. The advocacy of the difference between "some" and "substantial" does not come easy to counsel for firms who have never been in such an unusual procedural situation. When the fact of secrecy is not enough, and the practice of customary secrecy is also not sufficient, but the measure of the "substantiality" factor is uncertain and beyond the control of the submitter, a grave state of unpredictability results.

An unpredictable standard creates a loophole in federal criminal law. The Justice Department in 1979 suspended most use of the Trade Secrets Act against federal employees who deliver a piece of commercial confidential data to a third party, e.g. a competing firm, see Section 9-2.025, U.S. Attorneys Manual. The ostensible reason was the confusion of when disclosure would be permissible under the current state of the (b)(4) exemption. Some prosecutions would be possible with Washington's clearance but none have been instituted in the last several years. If the provisions of S. 1247 were in place, greater predictability of what can be withheld will fill that loophole. The Department's

lack of use of prosecution as a penalty for unauthorized disclosure is not a reflection that commercial secret data has not been disseminated, but rather reflects the fact that much dissemination is not a matter of public record sufficient to alert either the affected owner or the local U.S. Attorney.

Finally, the Subcommittee will explore alternatives to S. 1247 and may be interested in fine-tuning the public interest override section. The current 1247 solves the problem of uncertainty while leaving a necessary "safety valve" for exceptional cases. As the alternatives are examined, the Subcommittee should weigh their predictability of result; the extent of subjective judgment which they bring back into the standard; and the need for legislated proof standards sufficient to curb agency misuse of the intended strength of this clause (f)(3) as an excuse to maintain routine patterns of such disclosures.

THE NEED FOR PROCEDURAL REFORM IN THE FOIA PROCESS

1. Notification

Virtually all of the witnesses and commentators who have testified or written about the commercial confidentiality issue support the proposition that notification should be given to the submitting person or owner of private confidential data before the data is disclosed.

It is an anomaly in the administrative law of the United States that one form of administrative disposition of a private property value, the value of exclusive possession of information about a business, could be permitted with no notice to the submitter/owner. That anomaly raises a significant question of Fifth Amendment rights as there is a property interest in that possessed information which does not lapse when one permits an agency to have access to the same information. Because I have discussed the constitutional aspects at length elsewhere, see 1 O'Reilly, Federal Information Disclosure §10.16(1980 Supp.), I will merely restate my belief that the disclosure of one person's valuable data to another person by an agency without notice and an opportunity to be heard is a denial of constitutional due process. The Subcommittee may be hearing later from the leading scholar on this issue, Mr. Roger Milgrim of New York, at its September hearings. Mr. Milgrim, author of the definitive treatise Trade Secrets, asserted the constitutional due process issue in the extensive Wearly litigation which §10.16 of my text explored.

One government body, the Food and Drug Administration, has a policy of refusing such advance notice and has been resolute since 1974 that it will not provide such notice. While no agency is required to give notice, many do. The FDA policy stands as a sufficient rebuttal to those who have argued that notice can be handled on an agency"recommendation"rather than as a matter of legislated rights. To the extent that other agencies follow the FDA practice,it vitiates the argument that statutory notice is unnecessary.

Absence of notice can cause significant harm, first from ignorance by those who never know of the disclosure and secondly from the consequence of particular disseminations. A competing firm which obtained my client's secret development of a surgical drape treatment chemical in late 1980 was probably seeking the same chemical with the same characteristics (and the same ability to get through FDA acceptance processes) through research. Once the secret identity had been disclosed by FDA, the ignorance that

secrecy had been breached would have led the innovative firm to believe that it had a "lead time" advantage over its competitor. In this case,the technical staff responsible for that project learned that FDA disseminated the secret and a prompt demand was made for the FDA to withhold that identity. Had we not known the fact that FDA had passed the secret to the competitor, our assumptions about marketing could have been seriously flawed. The consequence of that particular disclosure will not be known in the marketplace for some time, but the competitor who is believed to have received the information -- working through a blind search service -- saved the cost of trial and error of locating that material and discovering its usefulness for that application and then clearing its use through FDA. That firm had an established position four times larger than that of our relatively new product line in that market.

This 1980 case underscores the length to which this unusual "substantial competitive harm" test has compelled submitters to go in defense of their sensitive data. In preparing the submission, a lengthy paragraph cited the FDA statutes and rules and specifically claimed exemption. A formal request for advance notice before disclosure was made, with two alternate phone numbers for our contact people. The identity was marked with brackets and identified as confidential. And a duplicate page with the bracketed material excised by whited-out space was attached, clearly marked "public release copy". FDA gave no notice, as is its policy in the absence of a present statutory requirement. Instead,it mailed the entire packet of papers to the competitor's agent.

A second research project led to a planned marketing of another surgical-use product which is not yet on the market. That product went through the FDA processes with a specific request under 21 CFR §807.95 that it not be disclosed until it was placed on the market or until commercial distribution began. On July 10, 1981, I learned that FDA had publicly disseminated the product identity, product category, trademark name, and our name, in a list of new clearances, and that list was freely available. I again have registered a protest with the FDA and again received no notice before the dissemination to my competitors of this future entry into the market.

Without a statutory right to notice, the owner is either unaware that damage has been done, or is aware and frustrated that the law gives no recourse. The competitor is able to use competitive "intelligence data" to oppose a new entry into the market with commercial arrangements. Sometimes the competitor stops its own research and adopts the newly-"discovered" work of an innovator whose work is released by the government agency. Sometimes the competitor can guess a future research direction from laboratory inspection reports or the like. As the Subcommittee will hear in its law enforcement and national security hearings, recipient organizations have a heavy incentive not to announce to the world what valuable information they have received from the U.S. agency files. Likewise, when Professor Stevenson spoke at great length about the absence of proof of injury, he did concede that it is possible that some affected innovators simply do not know what has happened to their files while in possession of agencies. In our experience, the owner who learns of the damage is in the minority. The owner who does learn, and sees that the Federal Torts Claims Act provides no adequate remedy, is frustrated and wary of freely passing information to that agency in the future.

Two aspects of S. 1247 deserve special comment. The bill aims to give the "real party in interest" notice before the disclosure

occurs. We endorse this concept. Where a submission has been made by an agent or association on behalf of another identified person, the person is the most impacted party when disclosure occurs. It is proper that the actual delivering source, the owner of the physical document, and (in the case of agency or association intermediates) the identifiable private party who is the subject of the information should receive this notice. In most cases it will be a straight notification on a form letter to the identified source itself. Where there is an apparent multitude of identified private party "subjects" who have a common affiliation, notice will be sufficient if given to the main "party" which represents those individual subjects. A labor union which solicited cards from workers has been held entitled to assert commercial confidentiality, through an agency's invocation of exemption (b)(4) on behalf of that union's workers, American Airlines v National Mediation Board, 588 F.2d 863 (2d Cir., 1978). Likewise there will be situations in which an intermediary acts as an agent, for purposes of notice, in those situations where identifiable private parties are too numerous for convenient use of the additional notification provisions, once the agency has notified the intermediary. Of course, if there was no affiliation of interest between the intermediary and the affected private party, both should receive notice.

A final aspect worth special comment is the scope of the notice subsection, (7)(A)(i). This provision is not intended to supersede prior specific provisions of the Privacy Act which require that the agency seek consent or provide notice of nonconsensual disclosures of a "record" about an "individual". Those Privacy Act procedures are unaffected. Since many millions of records do not fall within the criteria of that Act but do fall within the Freedom of Information Act's broader scope, this provision provides a notification where (A) a Freedom of Information Act request was received, (B) the agency has not decided to deny the request, (C) the information is not already in the public domain by dissemination of public materials, literature, public catalogs, or the like, and (D) the information was "obtained from any private source", excluding government as a source, or "concerns any individually identifiable private party", excluding aggregations about classes of nonidentifiable parties. Records concerning government officials or instrumentalities in their public capacity are not covered by this provision, nor are the aggregated statistics for an entire industry. No notice is required for dissemination of already-public information. Though an agency may not condition notice upon proofs of competitive damage, as some now do, it is reasonable for the agencies to ask submitters whether submitted material is already in the public domain so that agencies may "flag" sensitive private data.

In summary, S. 1247's notification system is needed and would work satisfactorily to accomodate submitter needs and agency efficiency.

2. Meetings to Discuss Confidential Status

The Freedom of Information Act operates best when it promptly permits oversight of government's action, without unduly harming legitimate private interests reflected in particular communications between the agency and private persons. Section (B)(ii) at page 3, line 12 of S. 1247 adds a new 5 USC §552(a)(7)(B)(ii) which will be a cost-effective procedural advance over the haphazard operation of the current statute.

Agencies try to act on the best available information. But the ten-day time period available for Freedom of Information Act responses is too brief for consideration of the multiple factors

involved in the "substantial competitive harm" test. Agencies cannot be expected either to know the market and injury factors as well as submitters, or to be able to learn them within 10 days. In a situation analogous to that of the FOI Act, forced label disclosure of secret ingredients, the courts have compelled at least one agency to hold a reasonably focused dialogue on the question of confidential status before the agency makes its final decision, Zotos International Inc. v Kennedy, 460 F. Supp. 268 (DC DC 1978). The purpose of (B)(ii) is to give the agency a chance to quickly obtain responses to questions which the agency may have about confidential status and to permit the submitter to assert its reasons why the information should be withheld.

Speed is important to the requester, and S. 1247 requires the meeting to be requested promptly (within 5 days of the notice) by the submitter. Except in unusual circumstances when a formal extension is granted, the agency will hold the meeting in less than 30 days after the submitter requests it, and will decide the issues raised by the submitter within 30 days after the meeting is held.

Because the emphasis is on prompt processing of the information, this informal meeting is not the sort of "hearing" one normally associates with agency actions after "hearing". It is more like a meeting; it is not intended to produce a comprehensive record in the sense that some hearings produce a record for judicial review; and it is informal. Because the emphasis is also on a frank explanation of commercial value of a non-public piece of information, the requester does not attend. The requester has the option of submitting arguments on why the information should be disclosed; but (A) most requests for commercial data have come through "blind" search services, representing undisclosed principals; (B) very few denials of blind service requests have been administratively appealed; and (C) since the agency bears a factual burden of proof if it decides to withhold (and the requester-plaintiff does not), it is rational to have the agency learn as much as possible about the facts, while allowing the requester to place its legal argument into the record.

The meeting process cannot be used for delay beyond the limits of S. 1247, because the requester is deemed to have exhausted its remedies after 40 or 60 days as provided in (F). The normal commercial data requester is quite willing to wait for the windfall of commercial information.

The right to a meeting on confidential status is not absolute. On the exceptional occasions when commercial data disputes involve a legitimate press need to report a story which is not complete with agency-generated information, there is a balancing between the press's interest in the story and the private person's interest in continued confidentiality. The agency gives the notice, receives the request for a meeting, and then can deny the meeting and decide the issue on the written submissions if the submitter's claims are clearly frivolous or if the delay to hold the meeting would be severely prejudicial to an agency's (or the requester's or another person's) specifically stated interests, which override the need for that meeting. A specifically stated need for haste in the disclosure, coupled with an overriding public need for the document under amended (f)(3), allows that special public access which is needed in special circumstances.

The location of the meeting is intended to be cost-efficient for both the submitter and the agency, so that for example the submitter in Florida could visit the agency's office in Atlanta or Miami, and the submitter in Vermont could visit a Boston or Albany district office. The provision that the location be suitable is intended to afford smaller firms and

individuals a right to a meeting without having to pay to travel to Washington, D.C. However, it is not intended that the agency would have to establish meeting sites other than in normally available federal offices. The agency's representative can be any designated employee and need not be an administrative official of particular rank. In this way, the faster scheduling and conduct of the meeting is assured.

Cost-efficiency is a major reason for this change. Misunderstandings between agencies and submitters have led to lawsuits which could have been avoided through airing of the submitter's discomfort before suits were filed. For the submitter, the meeting will give feedback about what is really confidential and not really confidential. In some cases, that feedback will lead the submitter not to spend time and effort litigating a losing cause. Agencies may also have overlooked some important aspect of the confidential nature of the information which can be explained fully in an hour's discussion with the marketing expert or technical staff member of the submitting firm. The opposing view may be that it is more economical to review only paper and make a paper decision by mail. But quick wrong decisions lead to litigation. The meeting process is more likely to aid the agency in making the right decision for or against confidential status, and to aid the agency in articulating its reasons effectively.

3. Time and Cost Considerations

Professor Stevenson's testimony in this Subcommittee was critical of the administrative procedures which would be necessary to provide fair notice to submitters. He also expressed the view that competitors' access to submitters' information was beneficial to competition as a whole. And he asserted that government collection of data can rightly be accompanied by forced dissemination as the price of a submitter's clearance through the agency process. These concerns deserve careful examination.

First, S. 1247 is addressed to a situation in which 80+ % of requests come from requesters with a commercial exploitation motive for access, rather than some charitable,educational or civic purpose. At the Food and Drug Administration, 85-90% of requests are from business firms, and often half of those or 42-45% of the total are made through blind search services on behalf of undisclosed clients. S. 1247 tightens the standard by which submitted private data is withheld. A large percentage of the 33,000 requests which the Food and Drug Administration received last year were requests for private documents held in an FDA file. Presumably, S. 1247 would cut back a large number of FOI requests which now are required to be processed through FDA. Of those which now go through blind services seeking access to private documents, perhaps two-thirds would evaporate. Of those made by competitors for competitive data, perhaps three-fourths would no longer be made, since the overriding public interest test would not be made. However, the 3% of requests by the media would continue. FDA would devote more attention to handling them with its lessened backlog. And the EPA, OSHA, and comparable regulatory agencies which were not required to do as much screening of sensitive private data would be able to put resources back into enforcement programs and productive efforts. Therefore it is short-sighted to criticize S. 1247 as another layer on top of the current flood of private data requests. If it reduces that flood considerably it will be serving the press and public requesters more efficiently and with greater speed. Net costs will be lessened.

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Second, academic experts frequently disagree. Professor Stevenson's law school courses and his legal research have led him to certain opinions about economic effects of the FOIA system. In contrast, Professors Marthinsen and Casey testified at length about their economics research and interviews which led to their presentation to the Eastern Economics Association in April and their testimony to this Subcommittee in July. They made the telling point that disclosure's static benefits in re-allocating knowledge which we already possess as a nation (sharing the existing technology via FOIA disclosure) are outweighed by disclosure's harm to dynamic competition, the desire to improve and innovate. The loss of incentives to innovate through government-forced disclosure are significant economic factors, in the Babson College study. Congress seems to have agreed with the Babson approach in its balancing in such disclosure provisions as the pesticide statute, when in 1978 Congress adopted a public access right for safety information about pesticides and coupled it with strict prohibitions against the free use of that information by domestic competitors (7 USC §136h(d)(1)) and absolute prohibitions against its passage to foreign competitors (7 USC §136h(g)). The dynamic competition which has produced so many innovations in this country should not be changed without the kind of serious economic examination which the Babson College scholars have undertaken.

Third, Professor Stevenson submitted that disclosure is a "given" where the submitter seeks some federal license or benefit and therefore that the FOIA need not be amended to limit disclosure of private submissions. A large company files thousands of agency reports each year. Relatively few of these relate to permission for action or licensing. Most are statistical collections or some form of oversight of the marketplace. The vast majority do not solicit government blessing for an activity, by whatever title it is described. And those which do seek licenses or approvals do so under statutory schemes which Congress has considered, debated, and passed. Congress has decided that medical device summaries of safety and effectiveness will be available but that actual test data will not. (21 USC §360j(c),360j(h)) Congress has opted for disclosure of pesticide safety data but has barred its use and foreign dissemination, as discussed above. It does not follow from the act of licensing that the price of the license is a loss of one's technology. If it did, licensing might be the end of advances in nonpatentable technology in a particular product line. It was instructive that both Representatives Kindness and Erlenborn asked Prof. Stevenson about this license theory during the House hearings on July 16, and both expressed doubt about the generalization that disclosure is a necessary price of market entry.

Professor Stevenson postulates in his book that there will be an inequitable competitive effect from the release of information about one particular firm "whereas if similar information were released about all firms in an industry, the overall impact on competition would be nil--or even salutory. What is clearly needed is an effort to rationalize the disclosure process." (Stevenson, Corporations and Information 181 (1980)). We have seen Congress adopt general disclosure rules for total industries in the form of the Securities Act requirements. But the current FOI Act is too general an umbrella for that type of reform of "salutory" dimensions. Costs of the FOIA to our dynamic competitive system can be reduced if we rationalize the process by reinstating customary confidentiality and institute a public interest override. Then costs to particular industries of the particular reforms he has espoused can be reviewed in a statute-by-statute context.

As to time of the present process, we believe that S. 1247 has a more rational system of gradations of response time, than the current law. Historically, ten days was selected for the wrong reasons, as part of a competition between Congress and the Ford Administration on substantive issues during which procedures were a part of the bargaining (or lack of bargaining) in the 1974 veto and post-veto period. The ten days has proven totally unsuited for the more complex requests involving business data though it has had some beneficial effects to encourage the news media's access,on faster timing than pre-1974, to internal memos and similar agency-created documents. For those exceptional instances in which injury may be done to an overriding public interest in specific private information if disclosure is delayed, S. 1247's twin provisions, new section 552(a)(7)(B)(ii) proviso and 552(f)(3) are sufficient.

One could postulate that as backlogs of commercial requests decline,the agency will produce more prompt responses to all of its noncommercial data requests. The original intention of the American Society of Newspaper Editors, first drafters of a Freedom of Information Act, was for prompt agency action in response to press and individual citizen access requests. Moving into a system founded on S. 1247 would serve that original goal.

4. Venue of Court Actions Challenging Disclosure

The business community endorses the retention of current venue principles of 28 USC §1404 in reverse-disclosure litigation, as intepreted by the Supreme Court in GTE Sylvania Inc. v Consumers Union of the United States Inc., 445 US 375 (1980). It would be unnecessary and unfair to change the venue rules to favor the requester. Where the agency and the submitter have disagreed in the past, three-fourths of submitter-initiated lawsuits have been brought outside of Washington. Where a (b)(4) exemption defense was raised against a suit seeking disclosure, however, 53% of the cases seeking disclosure were brought in Washington. (Source: ABA Course Book for May 11, 1981 Seminar, "Your Business, Your Trade Secrets and Your Government", pages 13a et seq.)

S. 1247 is proper in maintaining the present opportunity for either the submitter or requester to fairly challenge the decision of the agency. It makes no change in the venue or the jurisdictional prerequisites for such litigation.

5. Volume of Litigation

It is not expected that S. 1247 will produce more litigation over commercial data withholding. Eliminating the uncertainty of substantial harm standards makes FOI administration more understandable. Few of the commercial"fishing in files" requesters have used litigation to force disclosure after legitimate explanations of the denial of access; these few situations may continue. And the (f)(3) public interest override is likely to involve relatively few cases, in most of which the agency will have explained its position through the informal meeting so that some submitter lawsuits will be deterred. Though all new legislation produces some litigation, S. 1247 will not significantly expand the absolute number of FOI-related lawsuits.

6. The Right to De Novo Judicial Review

When a federal agency proposes to take a private person's farm, or automobile, or machine, the private person has

rights to a fair hearing in court on the question of the legal status of the taking. A particular piece of commercial information could signal the future trading intentions of a person on a commodity exchange, or could disclose a piece of information about financial weaknesses of that person in a particular market, or could enable a competing firm to selectively recruit away the best trained and most valued employees of another firm in a particular location. Passing that value from one firm to another firm via the Freedom of Information Act is a removal of exclusive possession of the owner's property, and a transfer of that value to some other firm. The owner should have the right to a fair hearing in court before the transfer is made by the agency.

Under current law, most cases have provided for full hearings of the submitter's argument that private data should not be disclosed. These cases have granted de novo review rather than merely limiting review to the paper record before the agency. Those courts which have refrained from de novo review have been able to note an extensive administrative record which produced an extensively reasoned conclusion, see eg St. Paul's, etc. v United States, 506 F.Supp. 822 (N.D. Ga., 1980). But most courts have afforded a de novo review and have heard the witnesses offered by the submitter, see eg Burroughs Corp. v Brown, 501 F.Supp. 375 (E.D. Va., 1980).

The Administrative Procedure Act was not written with thought to the unusual circumstances of submitter-agency disputes. The APA "ordinarily" does not provide for de novo review and the Supreme Court chose not to decide when that review could be provided, Chrysler Corp. v Brown, 441 US 281 (1979). Ordinarily there is a more comprehensive record than there is in FOI matters. The typical FOIA submitter-initiated case has begun with a submission letter, a request letter, a notice of disclosure (where permitted by agency practice), a submitter's letter asking that the document not be disclosed, and the agency's letter denying the submitter's claim for withholding. Ordinarily a record for review will include preliminary support documents, a proposed rule or action, public comments, and a final articulated agency decision or regulation. But the five or so letters in an agency file of a proposed FOI disclosure case are not a sufficient record for paper-only review. The court should be willing to hear the testimony of the experts and of knowledgable officials of the submitting firm. This evidence would support the judicial determination of confidential status much more fully than would a paper record.

Under current law, agencies win whenever courts refuse to provide de novo review if the paper record has been tailored to provide at least a facially valid claim in support of the agency decision. Absent live testimony, an agency can write its letters using a format and content designed to survive review under the "arbitrary and capricious" standard of review. Deference of the court to the interpretation of the agency compounds the problem for the submitter.

Because the agency and the submitter may be adversaries on a variety of substantive matters -- with the requests for disclosure sometimes coming from the agency's allies on the merits of those proceedings -- the perception of unfairness in the way an agency has built a record supporting dissemination of the submitted data is often present. Dispelling that perceived unfairness requires an impartial determination by a federal court. For example, if a company and agency are in litigation on an enforcement matter and a party interested in the agency's winning that case should make a request for disclosure of the company's past submissions to that agency, the company could

reasonably expect that a federal judge would give a more fair hearing on the merits than if he or she merely read the paper record before the agency and decided it did not appear to be "arbitrary or capricious".

S. 1247 takes the correct approach to this question. It makes the remedies for both the submitter and the requester symmetrical. Requesters always get de novo review (5 USC §552(a)(4)(B)). It is equitable to adopt the same treatment for those submitters who have to litigate in opposing disclosure (S. 1247 p. 8 line 12). The requester now gets an opportunity to make an administrative appeal, sometimes with a visit to the agency as well, before the de novo review. The submitter will have a chance for a fast, informal meeting with the agency before the de novo review would occur. In neither the requester's nor the submitter's case is there the kind of comprehensive record normally found in "arbitrary and capricious" reviews on the agency record, in the most typical judicial review actions under the APA. When the agency has acted properly and the preponderance of the evidence supports the agency's action, the agency prevails.

Exhibit 1

Exhibit to Testimony of James O'Reilly

PROCEDURAL CHANGES UNDER S. 1247

	CURRENT LAW	S. 1247 PROCEDURE
1.	Submission of Confidential Data	Submission of Confidential Data
2.	Request Received for Disclosure	Request Received for Disclosure
3.	Agency Not Required to Notify the Submitter; Some do so in practice, others by their rules	Notice would be given, informing the actual source and/or the owner of the information, unless agency has decided not to disclose it. Contents will be statement of what has been requested and what rights are available to owner.
4.	Agency not required to consider objections to disclosure; many do, in writing and sometimes in informal meetings	Meeting with the agency at suitable location at which agency receives the submitter's explanation of confidential status. Agency notifies both submitter and requester of its decision.
5.	Requester can sue Agency after waiting 11 days from receipt by Agency of the request	Requester can sue on notice of the Agency's decision, or if Agency delays, then after 40 or 60 day period. In most cases, ample notice is given to requesters who will have no incentive for early litigation.
6.	Agency decision can be basis of litigation by either side in court where venue is proper.	Same.
7.	Court examines the issues de novo, hearing witnesses and submissions from all parties. BUT some courts refuse de novo review and limit submitter to Agency's paper record of its decision.	Court examines issues de novo.
8.	Submitter must prove "substantial competitive harm" from disclosure of this piece of information, in addition to proof of its customary and actual confidential status.	Submitter can prove either that disclosure would cause substantial harm or that the information is customarily confidential and is not in fact public. Agency overrides this showing by evidence that public's identifiable interest would be seriously injured if document is not disclosed to the requester.
9.	Final decision by the courts.	Final decision by the courts.

EXHIBIT 2

(blind cc to Prof. Stevenson)

THE BUCKEYE CELLULOSE CORPORATION

GENERAL OFFICES P.O. BOX 599, CINCINNATI, OHIO 45201

December 17, 1980

Mr. Wayne L. Pines
Associate Commissioner for Public Affairs (HFI-1)
Food and Drug Administration
5600 Fishers Lane
Rockville, Maryland 20857

Re: Mistaken Release of Trade Secret Formula Information for Boundary Drape Products

Dear Mr. Pines:

Our firm manufactures Boundary surgical drape and gown products which are distributed by an affiliated company. Our firm has a number of medical device 510(k) notifications on file with the Bureau of Medical Devices. On May 16, 1980, we submitted a document to the Bureau regarding a trade secret ingredient used as an odor masking agent for sterilized drape and gown products, and with that document we attached an excised public access copy which deleted the trade secret data. That trade secret data was shown by brackets and asterisks, with an explanatory paragraph which told the Bureau that "identity of the substances used are trade secret formula information" which is proprietary to our firm and its affiliated companies. We requested advance notice prior to any release.

That trade secret ingredient's identity was disclosed to a competitor's regulatory consultant, Jonas Bassen, on November 18, 1980, under F80-26115, over the signature of Mr. Harry R. Stonaker, Jr. of the Bureau. That competitor is expected to move to a similar irradiation system for its products, and will probably save the time and experimentation costs of testing multiple odor masking agents if it is able to use our trade secret data in the preparation of its own 510(k) notifications and in its manufacturing and processing operations.

The Bureau (Mr. Stonaker) has advised that a check will be made of the handling of this file. In the interim, may we request that Gerry Deighton be instructed to place a hold on F80-26115, F80-27839 (a request for that file) and other disseminations. We then ask that the public access copy with deletions be placed in the disclosable file at the Public Records & Documents Center. If possible, future requests for disclosure of detailed ingredient information from our firm should be screened carefully prior to dissemination. Thank you for your attention to this matter.

Sincerely,

James T. O'Reilly
Official Device Correspondent

cc Mr. Gerald Deighton (HFI-35)

Exhibit 3

EXHIBIT: ECONOMIC ANALYSIS OF ONE DISCLOSURE SITUATION IN A TYPICAL LITIGATED CASE INVOLVING THE BURDENS OF THE "SUBSTANTIAL COMPETITIVE HARM" TEST

TAKEN FROM THE COURT FILE IN PUBLIC CITIZEN v FDA, CIV. 79-1710 (DC DC 1981 PENDING)

NOTE: The litigation did not involve our Company but its detail of evidence and its 1981 filing in an FOIA case present a very current picture of what burdens of substantiation come along with the "substantial harm" burden against submitters of confidential data. For reasons of length, only the index is provided in this exhibit; a full copy will be provided to the Subcommittee for the files.

ECONOMIC CONSULTING SERVICES INC.

AN ANALYSIS OF THE ECONOMIC IMPLICATIONS OF PUBLIC DISCLOSURE OF TRADE SECRETS AND CONFIDENTIAL COMMERCIAL INFORMATION OBTAINED BY THE FOOD AND DRUG ADMINISTRATION IN THE CLINICAL INVESTIGATIONS OF INTRAOCULAR LENSES

Prepared By

Economic Consulting Services Inc.

April 16, 1981

1320 NINETEENTH STREET, N. W., WASHINGTON, D. C. 20036 (202) 466-7720

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Mr. RADER. Mr. Braverman.

STATEMENT OF BURT A. BRAVERMAN, PARTNER, COLE, RAYWID & BRAVERMAN, WASHINGTON, D.C.

Mr. BRAVERMAN. Thank you.

Last week, in testifying before the House in similar hearings, I characterized my testimony as a confession. It was a confession of advice which I am now compelled to give my clients and advice which my clients are now compelled to follow.

It is advice that I do not want to give. It is advice that they do not want to follow, but it has become necessary.

The substance of the advice is: Do not cooperate with the Government. Do not give information to Government agencies when requested, and make it more difficult for Government agencies to get this information even when it is required to be submitted.

The reason for this advice is quite simple. Over the past 7 or 8 years, the courts have eroded the protection that exemption 4 of the Freedom of Information Act was intended to provide and which it is able to provide.

Three factors have contributed to this condition. First, the standard of confidentiality under the exemption has in essence been redefined by the courts—redefined from that which Congress originally intended. The customarily withheld standard which Senator Hatch mentioned in his introductory remarks has been eliminated from the act judicially.

Second, agencies have been given total and virtually unrestrained authority and discretion to disclose information, even though it is found to fall within the fourth exemption of the Freedom of Information Act and even though that might injure legitimate commercial interests.

Finally, the commercial interests at stake here have been deprived of their rights to obtain de novo review of an agency decision to disclose their valuable information.

These factors have created a perception on the part of industry that the Federal Government is either unwilling or unable to protect valuable intellectual property—information that is being submitted to Federal agencies—and that industry can no longer rely upon those agencies to protect that information.

Consequently, in response to my advice, my clients have now begun to follow a number of practices designed to make it more difficult for agencies to get this information. For example; some companies simply will not submit it to the agencies. Others now require the Federal representatives to come to their sites to examine the information, but do not allow them to take it back for further use. Still other companies must now make agencies subpena the information and go to court for enforcement of the subpena in a proceeding in which the company can secure protective provisions designed to prevent subsequent disclosure under the Freedom of Information Act of information furnished to the agencies.

All of these strategies are designed to make it more difficult for the Federal Government to get this information. Why? Because the Government under the present state of the law, is no longer able to protect this information as Congress intended it would do so when

the Freedom of Information Act was initially enacted and when exemption 4 was included within the act.

There is a solution—S. 1247. S. 1247 would fill the substantive void which has been created in terms of protection of commercial information by the court decision. S. 1247 would cure the procedural problems which are plaguing agencies and submitters alike. For example, the act does not require notification to a submitter; nor does it require that a submitter be granted a right to object. S. 1247 would provide these essential, basic rights.

Most importantly, S. 1247 would cure the perception that Federal agencies are either unwilling or unable to protect confidential business information.

You have heard critics say that this is an attack on openness and an attack on the Freedom of Information Act. It is none of those. What it is is an attempt to restore a balance that Congress intended when the Freedom of Information Act was originally enacted—a balance between openness on the one hand and a legitimate expectation that confidential business information submitted to the Government would be protected.

We would urge that S. 1247 be enacted to restore this balance.

Thank you.

Mr. RADER. Thank you, Mr. Braverman.

[The prepared statement of Mr. Braverman follows:]

PREPARED STATEMENT OF BURT A. BRAVERMAN

I am Burt A. Braverman, an attorney and member of the firm Cole, Raywid & Braverman. I am appearing before the Subcommittee to testify concerning Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(4), and "reverse FOIA" law suits.

I. PRELIMINARY REMARKS

My testimony today deals with the widespread misuse of the Freedom of Information Act as a means of obtaining confidential business information, the adverse impact which that practice has had both on the businesses which submit such information to the Government and on cooperation by such businesses with federal agencies, and the need to remedy this condition by amending Exemption 4 of the FOIA. This testimony is based on the experience and knowledge which I have gained in representing businesses in a number of reverse FOIA actions which they have commenced in order to enjoin federal government agencies from publicly disclosing private documents which are confidential and commercial in nature.

and in counseling those businesses on a continuing basis on procedures to safeguard such information. While the views which I will present today coincide with some of the positions which I have asserted on behalf of my clients in those cases, this testimony reflects my personal opinions and experience.

When Congress enacted the FOIA in 1966, Exemption 4 was included in order to serve a definite protective purpose with respect to confidential business information. Initially, the exemption was applied by the courts consistent with this legislative intent. However, in recent years, courts have construed Exemption 4 in a manner which, I believe, deviates from Congress' original intent and substantially restricts the protection which Exemption 4 was designed to provide to persons or businesses that submit private, confidential commercial information to federal government agencies.

Paralleling and perhaps in part responsible for this development, there has been a profound change in the purposes for which FOIA requests are being made. While initially intended to serve as a means for the public to learn more about its government, the Act has increasingly become a vehicle for surveillance, at public expense, of the private affairs of commercial enterprises by their adversaries.

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In 1979, with the Supreme Court's grant of certiorari in Chrysler Corp. v. Brown,[1/] there was great expectation that the Court would halt the erosion of Exemption 4 and resolve the many controversies concerning submitters' rights under the FOIA and reverse FOIA actions. Unfortunately, however, the Supreme Court's decision left unanswered as many questions as it decided. Thus, the Court issued no holding on the issues of (1) the scope of Exemption 4 (i.e., the definition of "confidential" commercial or financial information); (2) the status of the Trade Secrets Act, 18 U.S.C. §1905, under Exemption 3 of the FOIA, 5 U.S.C. §552(b)(3); (3) the relationship, i.e., "coextensivity" of Exemption 4 and 18 U.S.C. §1905; and (4) the proper scope of review in reverse FOIA cases. Moreover, while the Court held that the Trade Secrets Act prohibits the release of a wide range of business information unless disclosure is authorized by Congress, it also ruled that Exemption 4 of the FOIA is "permissive" in nature and that, therefore, agencies have discretion to disclose information falling within the exemption unless the Trade Secrets Act or some other law curtails such discretion.

The unsettled and unsatisfactory state of the law following Chrysler merely underscores what I and others have asserted for some time -- that Congress, not the courts, must

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1/ 441 U.S. 281 (1979).

ultimately decide the difficult legal and policy questions relating to reverse FOIA actions and submitters' rights under the Act. Assuming that the Congressional purpose underlying the Act still is to better inform the public of the manner in which its government operates, but not to facilitate the looting of private business records, Exemption 4 sorely needs to be amended to clarify that purpose and to restore the exemption to its original character.

Amendment of the Act is also needed in order to confirm the rights of submitters of private information to fair agency treatment and to adequate judicial review. The Act should be revised to delineate minimum types of procedures which must be adhered to by agencies before private documents may be publicly disclosed, and to formalize the right of an aggrieved submitter of private documents to obtain de novo judicial review of threatened agency disclosure of assertedly confidential information. However, it must be emphasized that unless Congress amends Exemption 4 to provide substantive protection as a matter of right to confidential business information, no amount of procedural reform will stem the growing tide of reverse FOIA litigation or restore the lost confidence of American businesses in the ability and willingness of the Government to respect and protect the confidentiality of commercial information submitted to federal agencies.

II. A VAST ARRAY OF PRIVATE INFORMATION IS AT STAKE

As our nation has grown during the past century, so has the size of our Government and the amount of business regulation. Today, there are literally thousands of federal agencies, departments, commissions, boards and task forces which administer a complex network of federal statutes and regulations cutting across all industries.

These federal agencies secure a constant and immense flow of information from the private sector. Such information comes both in response to statutory and regulatory filing requirements and also in response to informal, but no less compelling, agency requests for information from regulated as well as unregulated businesses. Although much of the private information which finds its way into government possession is required to be filed with federal agencies, a substantial amount of information is voluntarily submitted to the Government in a spirit of cooperation.

The information submitted by the private sector is staggering both in amount and in diversity. Major corporations each submit thousands of reports and documents every year to the federal government; [1/] and even small businesses

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1/ One company has estimated that it prepares 27,000 government reports and forms annually. Statement of Richard D. Wood, Chairman of the Board, Eli Lilly Company, before the President's Commission on Federal Paperwork, June 1, 1976.

supply the Government with a surprisingly large number of reports and other documents. These reports contain information concerning sales, manufacturing costs, technical designs, salaries and identities of key personnel, financial forecasts, descriptions of manufacturing processes, employment practices and a seemingly endless array of business matters. Because such reports are often submitted on a recurring basis, annually and even monthly, they provide extremely current and accurate data concerning these varied aspects of the reporting companies' operations.

The business value of such privately generated information generally depends upon its continued secrecy. Consequently, such information traditionally has been carefully guarded by businesses and, quite understandably, has not been disclosed either to competitors or to the public. Now, however, the tables of business privacy have turned as a result of the novel and unforeseen uses to which the FOIA is being put.

Today, the FOIA is being utilized by an extremely diverse group as a means of obtaining this private data. Competitors, disgrunted employees, potential and existing adverse litigants, self-styled "public interest" groups, foreign businesses and governments and a wide variety of others are using the Act to obtain information concerning private businesses which, but for the FOIA, would not be

available to them.[1] Yet, for the price of a postage stamp, such persons can now acquire such data from federal agencies, at public expense. The use of the FOIA for such surveillance of private affairs was not intended by Congress and needs to be remedied.

III. THE CONFIDENTIALITY STANDARD OF EXEMPTION 4 HAS BEEN CONSTRUED BY THE COURTS IN A MANNER INCONSISTENT WITH CONGRESSIONAL INTENT

The Freedom of Information Act was intended to better inform the electorate by opening the processes of government to public scrutiny; thereby, government would be made more accountable to the public.[2] However, Congress sought to balance the Act's disclosure philosophy with the

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1/ See Note, "Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards," 6 Loyola L. J. 594, 611 (1975); O'Reilly, "Government Disclosure of Private Secrets Under the Freedom of Information Act," 30 Bus. Law. 1125, 1134 (1975); Braverman, "Chrysler Corp. v. Brown: Protecting Business Secrets in the '80s," 4 Corp. L. Rev. 23, 27-29 (1981); Lardner, "Use, Abuse of Freedom of Information Act," Washington Post, July 27, 1976, p. A4; Schoor, "Telling Tales: How A Law Is Being Used To Pry Business Secrets From Uncle Sam's Files," Wall Street Journal, May 9, 1977, p. 1, col. 6; "Firms Big Customers For 'Free Information,'" Industry Week, November 1976, p. 34; Arnold, "Who's Fishing In Government Files?", Juris Doctor, April 1976.

2/ S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (hereinafter "S. Rep. No. 813"); H. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966) (hereinafter "H. Rep. No. 1497"). See Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C.Cir.), cert. denied, 400 U.S. 824 (1970).

"equally important rights of privacy with respect to certain information in government files."[1/] While each of the exemptions to the Act reflect this concern over rights of privacy to a varying degree, it was of particular significance to Congress in fashioning Exemption 4.

Exemption 4 was specifically designed to protect the confidentiality of information which is obtained by the Government through questionnaires, reports or other inquiries, but which would "customarily not be released to the public by the person from whom it was obtained."[2/] The Congressional intent concerning the scope of Exemption 4 was clearly defined by the House Report dealing with the exemption:

> "This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. . .It would also include the information which is given to an agency in confidence, since a citizen must be able to confide in his government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."[3/]

1/ S. Rep. No. 813, supra, at 3.

2/ Id. at 9 (emphasis added).

3/ H. Rep. No. 1497, supra, at 10 (footnote omitted) (emhasis added).

Cited by the Senate Report as types of information which "customarily would not be released to the public" were "business sales statistics, inventories, customers' lists, and manufacturing processes."[1/]

Congress contemplated that Exemption 4 would "assure confidentiality" of "quite broad"[2/] categories of information. Consistent with this intent, courts -- including the U.S. Court of Appeals for the District of Columbia Circuit -- repeatedly sustained this Congressional interpretation of the Exemption by refusing to order release of information on Exemption 4 grounds of confidentiality where the "information [is] of the type which would not customarily be released to the public by the person from whom it was obtained";[3/] or

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1/ S. Rep. No. 813, supra, at 9.

2/ 110 Cong. Rec. 19667 (1964).

3/ Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C.Cir. 1971) (emphasis added). See also Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C.Cir. 1970), rev'd on other grounds, 421 U.S. 168 (1975); Porter County Chapter of the Isaak Walton League of America, Inc. v. United States Atomic Energy Commission, 380 F. Supp. 630, 634 (N.D. Ind. 1974)(disclosure denied where information had previously been treated as confidential "in accordance with normal company procedures having a rational basis, and [where] information involved is in fact customarily held in confidence and is not customarily made available to the public"); M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972)("a court should determine, on an objective basis, that this is not the type of information one would reveal to its public"); Ditlow v. Shultz, 379 F. Supp. 326 (D.D.C. 1974); Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F.2d 73, 79 (D.C.Cir. 1974).

where such disclosure might be harmful to the private interests of the party who supplied the information to the Government.[1/]

Exemption 4 was consistently construed in this fashion during nearly the first seven years of the FOIA's existence. However, in a series of cases culminating in its 1974 opinion in National Parks and Conservation Assn. v. Morton,[2/] the U.S. Court of Appeals for the D.C. Circuit articulated a new and considerably different interpretation of Exemption 4 which would ultimately have the effect of emasculating the exemption and eviscerating the protection for business records which the Act was intended to afford. In National Parks, supposedly in an effort to replace the more "subjective" approach of earlier cases with a more "objective" standard, the court of appeals formulated a new test for determining whether information is confidential within the meaning of Exemption 4:

> "commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[3/]

The standard adopted by the National Parks case does not find its source in the legislative history of the

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1/ Ditlow v. Shultz, supra; Grumman Aircraft Engineering Corp. v. Renegotiation Board, supra.

2/ 498 F.2d 765 (D.C.Cir. 1974).

3/ Id. at 770 (footnote omitted).

FOIA and is, in fact, contrary to both the express terms and the legislative history of Exemption 4.[1/] Nothing in the FOIA or the Act's legislative history reflects any intent by Congress that Exemption 4 should apply to information which is inherently confidential in nature and which has been reasonably and legitimately treated as confidential only if it can be concretely shown that disclosure of such information would cause substantial competitive injury; indeed, proof of competitive injury as a test of confidentiality was simply not considered in the legislative deliberations on Exemption 4.[2/] Instead, the legislative history of the FOIA reveals that Congress intended that information which customarily and rationally has been treated as confidential by the party who submits it to the Government, or which would adversely affect a business' interests if disclosed, should be exempt from the disclosure provisions of the FOIA regardless of

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1/ See Patten and Weinstein, Disclosure of Business Secrets Under the Freedom of Information Act; Suggested Limitations, 29 Ad.L.Rev. 193, 195-202 (1977) (hereinafter "Patten and Weinstein").

2/ Id. at 198.

3/ Black's Law Dictionary 370 (4th ed. 1968) defines "confidential" as "Entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept in secret."

whether disclosure would result in substantial competitive injury.[1/]

The National Parks test of confidentiality is undesirable in several respects. First, it establishes a standard for exemption which is far more restrictive than Congress prescribed or intended, and under which important private interests will be lost. For, the National Parks test imposes a staggering burden of proof on the party seeking to bar disclosure by requiring it to make a concrete showing, within a period of ten days, that substantial injury to its competitive position will result when the submitter may not even know whether the information is sought or will be used by a competitor or, if so, how.[2/]

In this regard, it cannot always be demonstrated prospectively that information whose disclosure is sought will, if disclosed, competitively injure the submitter. As commentators and courts have acknowledged in the context of reverse FOIA actions, disclosure of a mere fragment of information which alone might not cause competitive injury, may

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1/ See Patten and Weinstein, supra, 29 Ad.L.Rev. at 197: "It seems clear that Congress intended Exemption 4 to maintain the status quo: business information which industry customarily held in confidence would continue to be exempt from mandatory disclosure under the FOIA."

2/ Id. at 199. To make matters worse, some agencies such as EPA have sought to impose an even more stringent standard of confidentiality than that prescribed in National Parks. See Note, The EPA's Proposed Rule for Freedom of Information Act Disclosures: A Model for Orderly Agency Determinations, 1975 Utah L.Rev. 943, 956.

ultimately cause substantial competitive injury if combined with other data which the competitor has been able to secure from other sources.[1/] Consequently, businesses which are unaware of the other data which their competitors have collected may be hard pressed to concretely demonstrate under National Parks that disclosure will cause substantial competitive injury even though they know that the likelihood of such harm at a future date is sufficiently great to justify the standard business practice of not disclosing the information.

Second, the National Parks test, in seeking to substitute an "objective" standard for withholding, in fact

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1/ In Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977), the U.S. Court of Appeals for the Fourth Circuit, in acknowledging the complexity of determining what information will, if disclosed, injure the competitive well-being of a business, quoted the following passage from Note, A Review of the Fourth Exemption of the Freedom of Information Act, 9 Akron L.Rev. 673, 683-84 (1976)(hereinafter "Note"):

> "[T]he industrial sector is still highly competitive. Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source; published government statistics and information, various legislative documents, analyses and surveys performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government-derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in certain contract bidding situations." (Emphasis added).

has set in place a highly speculative standard which requires agencies and courts to make hypothetical judgments as to whether, if such information were to be disclosed and if such information were to be used by a competitor, disclosure would cause substantial competitive injury. Since the identity of the requester, his purpose in seeking the information, and the information which he already has concerning the submitter are generally unknown,[1/] such a decision obviously involves a substantial element of crystal-ball gazing and represents a questionable means, at best, for determining whether information is confidential and should be protected.

Finally, the National Parks test focuses only on competitive injury but ignores other kinds of injury which disclosure of confidential commercial information might cause -- such as employee unrest, damage to goodwill, exposure to vexatious litigation, etc. These too are equally real, immediate and compelling forms of commercial injury which

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1/ Since the FOIA makes information available to "any person", 5 U.S.C. §552(a)(3), matters such as the identity of the requester and his intended use of the information may not be considered by an agency or the courts in determining whether the information falls outside of Exemption 4 and is, therefore, required to be disclosed.

warrant, and were intended by Congress to result in, the treatment of information as confidential under Exemption 4.[1/]

What have been the consequences of this judicial revision of Exemption 4? Whereas confidential business information was originally intended by Congress to be protected from disclosure, such information now is frequently disclosed to persons seeking to peer into the private affairs of companies which are regulated by or do business with the Government. The requesters include competitors, suppliers, customers, analysts, potential and existing adverse litigants, union organizers, and even mere "crackpots" with a grudge against a particular company. While none of these would otherwise be entitled to or have a means of securing much of the private information which businesses submit to the federal government, the Freedom of Information Act, as construed in National Parks, gives such persons carte blanche to rummage through these private records.

Moreover, the National Parks test has forced courts, agencies, submitters and requesters alike to engage in complex,

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1/ "[T]he reach of the exemption. . .is not necessarily coextensive with the existence of competition in any form." Washington Research Project, Inc. v. HEW, 504 F.2d 238, 244 (D.C.Cir. 1974), cert. denied, 421 U.S. 963 (1975). See also Ditlow v. Shultz, supra, 379 F. Supp. at 329 (recognizing likelihood of harm to "legitimate private interests" as a foundation of confidentiality); and see Patten and Weinstein, supra, 29 Ad.L.Rev. at 197.

cumbersome and costly economic analyses of documents which, at best, lead only to speculative conclusions regarding injury and, at worst, burden the courts, agencies, parties and the public. Indeed, the National Parks standard has in fact made the protection of Exemption 4 available only, if at all, to the very largest businesses. For, due to the extreme burden of proof imposed by National Parks and the resulting need to undertake extensive economic analysis and to employ expert witnesses, as well as the necessity of commencing litigation in the first place, reverse FOIA lawsuits simply are not feasible for most companies even though faced with the threatened disclosure of confidential business data.[1/] Surely, Congress could not have intended to trigger such an inquiry each time a request was made for business records under the FOIA; and, that would not be the case if Exemption 4 were construed and applied by agencies and courts in the manner which Congress originally envisioned.

Is this what Congress intended? Does this better inform the electorate about its government? Does this make the Government, as opposed to private businesses, more accountable? Was the FOIA intended to reverse traditional legitimate notions of business privacy? The answer to each

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1/ See Patten and Weinstein, supra, 29 Ad.L.Rev. at 194.

of these questions is an emphatic NO!

Exemption 4 should be amended to make clear that "substantial competitive injury" is not the exclusive test of confidentiality under the exemption. Where documents whose release is sought contain confidential business information, and where the documents contain the type of information which the submitter would not customarily disclose to the public, they should not be subject to release under the FOIA regardless of whether disclosure can be shown to cause "substantial competitive" injury or injury of any kind. In those limited situations where private commercial documents do directly reflect upon Government actions, they should be subject to disclosure only if (1) there is no alternative source of information which can be disclosed without identifying the submitter, and (2) failure to disclose would seriously injure an overriding public interest.

IV. EXEMPTION 4 SHOULD BE MADE "MANDATORY" IN NATURE

Prior to the Supreme Court's decision in Chrysler Corp. v. Brown,[1/] considerable debate was waged over whether Exemption 4 was "permissive" or "mandatory" in nature. While some courts[2/] had held that the exemption was only permissive and that agencies could, despite the applicability of the

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1/ 441 U.S. 281 (1979).

2/ See, e.g., Charles River Park "A", Inc. v. HUD, 519 F.2d 934 (D.C.Cir. 1975).

exemption, disclose confidential information, other courts had held that the exemption was mandatory and that agencies could not discretionarily disclose information which fell within the protective terms of Exemption 4.[1/] Those courts which held that the exemption was mandatory in nature placed considerable weight on the Senate Judiciary Committee Hearings, where it was said:

> "[N]ot only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors."[2/]

In Chrysler, however, the Supreme Court silenced the debate by holding that Exemption 4 was permissive in nature and that, absent some other restraint, an agency could disclose confidential business information despite the fact that it was found to fall within the Exemption. The effects of the Court's ruling have been twofold.

First, it has substantially weakened the protection available under Exemption 4. Together with the narrow construction of the exemption rendered in National Parks,

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1/ Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D.Va. 1974), United States Steel Corp. v. Schlesinger, 8 FEP Cases 923 (E.D.Va. 1974), both aff'd sub nom Westinghouse Electric Corp. v. Schlesinger, supra; McCoy v. Weinberger, 386 F. Supp. 504 (W.D.Ky. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).

2/ Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1964)(hereinafter "Hearings on S. 1666") (emphasis added).

the Court's ruling now makes possible and far more likely the disclosure of substantial amounts of confidential information which ought to be protected from release by Exemption 4.

Second, the Court's ruling, particularly when viewed in light of agencies' previously demonstrated insensitivity to businesses' claims of confidentiality, has reinforced the perception that those agencies cannot be relied upon to withhold confidential business information even when it is found to fall within Exemption 4 under the National Parks test. The significance of this perception should not be underestimated, for it directly affects the extent to which individuals and businesses will be willing in the future to submit confidential commercial and financial information to, and otherwise cooperate with, the Government.

Thus, as the Subcommittee is aware, by offering protection under Exemption 4 to confidential commercial information, Congress hoped to encourage individuals and businesses to provide this type of information to the Government.[1/] Indeed, most regulatory programs administered by government agencies rely heavily upon cooperation of the regulated companies in reporting as well as in compliance. Cooperation is significant not only where information is submitted on a wholly voluntary basis, but

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1/ Soucie v. David, 449 F.2d 1067, 1978 (D.C.Cir. 1971).

also where information is furnished pursuant to requirement; for even though the Government possesses the power to collect the information, cooperation by the submitter may improve both the quality and quantity of information which is supplied.[1/] These government functions would be severely inhibited, and the success of the programs gravely imperiled, if confidential business information were to be publicly disclosed.[2/] Disclosure would directly discourage compliance and would disperse a crucial source of industry information to the Government if the sense of integrity with which it was given was not respected.

A number of agencies have formally recognized this proposition, though their adherence to it in practice has been less than complete. For example, the Department of Labor has observed that "[d]isclosure of information obtained [in] confidence would hamper operating programs by reducing the quantity and reliability of the information which we received..."[3/] Similarly, in FAA Administrator v. Robertson,[4/] where the Supreme Court held that information provided to

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1/ Would Macy's Tell Gimbels, supra, 6 Loyola L.J. at 604.

2/ Id. at 603-05.

3/ Hearings on S. 1335 Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 436-437 (1965); see also Hearings on the Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 1619 (1972) (hereinafter "Government Operations Committee Hearings").

4/ 422 U.S. 255 (1975).

the agency by commercial air carriers was not disclosable, the Court adopted the agency's argument that, even though 14 C.F.R. §121.681 et seq. required that the information be submitted to the agency and provided sanctions for non-cooperation, agency disclosure "would surely undercut the Federal Aviation Administration's ability to properly fulfill its investigative duties. . .[since]. . .frank and full voluntary disclosure" was essential. The agency argued, and the Court recognized, that disclosure would adversely affect airline cooperation and, as a result, the program would be "seriously impaired."[1/] Similarly, the Environmental Protection Agency stated in FOIA oversight hearings that disclosure of information submitted voluntarily by Government contractors would impair the agency's ability to obtain such information from the contractors in the future.[2/]

Despite statements such as these, many federal agencies assert that disclosure of confidential business information will not disrupt the flow of data to them. Apart from the basic conflict of such a contention with common sense, the fact is that a number of courts have found that

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1/ See the FAA's Supreme Court Brief on the Merits, at 26, in FAA Administrator v. Robertson, supra.

2/ Statement of Gerald P. Norton, Deputy General Counsel, Federal Trade Commission, Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, September 15, 1977 (hereinafter "FTC Statement") at 9.

disclosure of such information will, in fact, impair agencies' ability to collect data from the public.[1/]

In this regard, the Subcomittee should be aware that the perception that federal agencies cannot be relied upon to protect confidential business information even though it falls within Exemption 4, has already resulted in the business community becoming far more cautious in submitting information to the Government. The following examples are only some of the many reactions which have been provoked by the absence of adequate protection under Exemption 4:

(1) Some companies now refuse to furnish copies of confidential business documents to agencies and, instead, only allow the agency representatives to inspect the material on-site at the companies' facilities. Thereby, the materials do not become agency records subject to the FOIA. This practice, however, clearly reduces the overall amount of information furnished to agencies and impedes the agencies' performance of their functions.

(2) Alternatively, companies will furnish such information to federal agencies but only on the condition that the documents and all copies be returned to the company

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1/ See, e.g., United States Steel Corp. v. Schlesinger, supra; Dickerson v. United States Steel Corp., 12 E.P.D. §11095 (E.D.Pa. July 16, 1976); Porter County Chap. v. U.S. Atom. Energy Commission, supra, 380 F. Supp. at 634; Sanday v. Carnegie-Mellon University, 12 FEP Cases 101 (W.D.Pa. 1975).

as soon as the agency completes its examination. Once again, cooperation with the Government and agency efficiency are reduced by the perception (as well as the reality) that the confidentiality of business information will not be respected.

(3) Many other companies now simply refuse to voluntarily furnish confidential business data to agencies and, instead, make agencies subpoena such data. Then, they resist those subpoenas, requiring the agency to commence enforcement actions in federal court where the companies can seek a protective order which will prevent the disclosure of such information by the agencies under the FOIA.[1/]

1/ For example, in United States v. Exxon Corporation, Nos. 80-1002, 80-1003, 80-1018 (D.C.Cir., February 25, 1980), the court of appeals ordered enforcement of a Department of Energy subpoena subject to a protective order permitting the company to retain physical possession of "extremely confidential" documents, requiring that DOE exercise no discretion to disclose exempt information furnished pursuant to the subpoena, and ordering the agency to return all subpoenaed documents to the company at the conclusion of its study. Similarly, in FTC v. Anderson, Nos. 78-1048, 1979-2 Trade Cas. ¶62,837 (D.C.Cir., Sept. 17, 1979), a subpoena for corporate data in an adjudicative proceeding was enforced subject to a protective order which required notice to the company at least ten days prior to any disclosure by the agency of assertedly "confidential" documents. Finally, in FTC v. Johns-Manville Corp., No. 78-1048, 1979-2 Trade Cas. ¶62,837 (D.C.Cir., Sept. 17, 1979), an investigative subpoena which sought trade secret information was enforced subject to a protective order that required the FTC to initially deny all FOIA disclosure requests for the information; required the FTC to give the company ten days' notice prior to release if disclosure was authorized by the agency; prohibited the FTC, if the company filed suit to enjoin disclosure, from disclosing the information without court approval; and allowed the company to request the return of its documents at the close of the investigation, subject to the FTC's need to retain the information to fulfill its statutory obligations and the requirements of the Federal Records Act.

[continued on next page]

(4) Some companies have even withdrawn from government contracts rather than risk the disclosure of confidential business information which they must submit to federal agencies as part of the contracting process. For example, the Sikorsky Aircraft Company was reported to have taken such action rather than risk disclosure under the FOIA of technical information which the company would have had to submit to the agency in connection with the contract award. Indeed, Sikorsky had already been informed that it was the successful bidder on the contract but nonetheless chose to withdraw its proposal and confidential documents when the agency refused to assure it that the documents would not be subject to disclosure under the FOIA. 1/

[footnote 1/ continued from previous page]: In another such action, Wearly v. FTC, 462 F. Supp. 589 (D.N.J. 1978), rev'd, 616 F.2d 662 (3d Cir. 1980), the company refused to produce assertedly confidential documents in response to an administrative subpoena unless the agency agreed to issue a protective order guaranteeing that the information would not be disclosed to the public under the FOIA. The district court agreed with the company, finding that the documents at issue did in fact contain trade secret information, that the information would be subject to release under the FTC's disclosure regulations, and that disclosure of the information under the FOIA would constitute a taking of the company's property for private purposes without compensation, in violation of the Fifth Amendment of the Constitution. Accordingly, the district court denied the FTC access to the company's documents, except pursuant to a court-issued protective order. On appeal, the U.S. Court of Appeals for the Third Circuit vacated the district court's order on the ground that the case was not ripe for judicial review. However, the court did comment that it could not understand why the FTC refused to agree to an order which would have protected the company's proprietary interests without restricting the agency's investigation.

1/ "Sikorsky Drops Bid for Copter Design," N. Y. Times, March 27, 1979, §D, p. 4, col. 5.

These examples reflect the tension which has arisen between industry and Government as a result of the continuing erosion of protection available for confidential business information under Exemption 4. Agencies are getting less information; yet they are being forced to go to much greater lengths to acquire it. The free flow of information to the Government and the atmosphere of cooperation between federal agencies and those whom they regulate can be restored only if both the perception and the actual threat of disclosure of confidential business information is removed. Accordingly, Exemption 4 should be amended by redefining the test of confidentiality under the exemption and by providing that, absent serious injury to an overriding public interest, information falling within Exemption 4 shall not be disclosed.

V. THE FOIA SHOULD BE AMENDED TO EXPRESSLY PROVIDE FOR DE NOVO JUDICIAL REVIEW IN REVERSE FOIA ACTIONS

Among the most controversial questions presented to, but left unresolved by, the Supreme Court in Chrysler Corp. v. Brown was the issue of whether judicial review in reverse FOIA actions should be conducted de novo or, alternatively, limited to a determination based on the administrative record of whether the agency abused its discretion in deciding to disclose. The failure of the Court to resolve this controversy is troublesome not only in the sense of the uncertainty which it leaves in the law governing reverse FOIA actions,

but also in the perception which it fosters among submitters that they may not be afforded an adequate opportunity for judicial review of their confidentiality claims. Congress should quell these fears and eliminate this uncertainty in the law by amending the FOIA to provide submitters with an express right to de novo review.

The right of submitters to de novo review has previously been recognized by a number of courts. For example, in Westinghouse Electric Corp. v. Schlesinger, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's holding that a reverse FOIA plaintiff is entitled to de novo review of intended agency disclosure of its documents.[1/] In reaching that conclusion, the Fourth Circuit gave great weight to the decision of the D.C. Circuit Court of Appeals in Charles River Park "A", Inc. v. HUD, where the court of appeals had instructed the district court to

> "hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *** In holding this hearing, the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all. . ."[2/]

1/ 542 F.2d at 1208, 1214-15.

2/ 519 F.2d at 940-1 n. 4. "[S]ince the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-270." Barlow v. Collins, 397 U.S. 159, 166 (1970).

An identical result was reached, although on somewhat differently articulated grounds, in Sears, Roebuck and Co. v. GSA.[1/]

While a number of courts have held that a reverse-FOIA plaintiff is entitled to de novo judicial review, legislative action expressly establishing this right is nonetheless necessary because the issue continues as a source of litigation and conflicting judicial opinions.

Legislative recognition of a submitter's right to de novo judicial review is also desirable in light of the nature of the administrative decision-making process in which the submitter's rights are initially determined. While the agency employees who pass upon disclosure requests are skilled at performing their primary functions, they are not properly qualified to assess the serious impact which disclosure of assertedly confidential commercial information will have on the submitter. Thus, most government employees who pass upon FOIA requests and claims of exemption are primarily trained to perform wholly distinct job responsibilities; they are not, however, either expert economists or judges, and have no adequate training or experience either to independently analyze the impact of threatened disclosure or to assess competing claims and expert testimony as to what effect disclosure will have. Indeed, Government agencies have previously admitted as much, stating that they do not have the capability to independently evaluate the competitive nature

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1/ 553 F.2d 1378 (D.C.Cir. 1977).

and value of much of the private commercial data which is furnished to Government agencies.[1/]

Moreover, the inadequacy of the agency process generally results in the agency's failure to develop an adequate "record" of the agency's action. Absent an adequate agency record, judicial review must be conducted de novo since there is otherwise no basis for determining whether the documents ought to be disclosed.

The U.S. Court of Appeals for the Fourth Circuit has focused on this very matter. Recognizing that "the protection of a competitive position is both a valuable and often complex matter. . .",[2/] the Court has reasoned that it is essential that a submitter who is confronted with an agency decision to disclose be afforded access to the courts for de novo review of his claim of exemption from disclosure:

> "There is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have,

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1/ Government Operations Hearings, supra, at 1619, 2114. See also FTC Statement, supra, at 3.

2/ Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1213.

> as has already been observed, [1/] in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one 'basic to our free enterprise system'. Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a de novo trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a de novo trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right', seeks what may be regarded as correlative relief?"2/

Similarly, it must also be recalled that many agencies are now characterized by an institutional bias in favor of disclosure which may render these agencies insensitive to businesses' claims of confidentiality and may well impair agencies' ability to develop a fair and adequate record of the administrative action. This bias often results in

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1/ The Fourth Circuit, quoting several commentators, observed that "'the agencies cannot always be relied upon to protect adequately the confidentiality of that information. *** Counsel for the agency. . .has little or no incentive to protect the secrets of the business community. *** It may be bad for appearances in a period of "openness" and "honesty" for an agency to refuse disclosure from its files.'" In contrast, "the individual is more aware than the agency of the potential competitive harm he will suffer should information be released." 542 F.2d at 1212. See O'Reilly, supra, 30 Bus. Lawyer at 1134.

2/ 542 F.2d at 1213.

development of an administrative record designed to justify an agency's decision to disclose rather than in development of the record during the course of deciding whether or not to disclose.

Just as Congress recognized that de novo review of an agency decision not to disclose was necessary to "prevent [judicial review] from becoming meaningless judicial sanctioning of agency discretion",[1/] de novo review of a decision to disclose must likewise be ensured. Accordingly, the Freedom of Information Act should be amended in order to provide for a right to de novo judicial review of an agency decision to disclose.

VI. EXISTING AGENCY PROCEDURES INADEQUATELY PROTECT THE RIGHTS OF SUBMITTERS OF CONFIDENTIAL INFORMATION

Problems also abound in the procedures which are employed by federal agencies in ruling upon claims of confidentiality and in processing requests for disclosure of confidential business information.

Release of confidential business documents would often injure, and possibly destroy, a submitter's property rights in the commercial information contained in those documents. While the formality and procedural requisites may vary, it is nevertheless well settled that the Fifth

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1/ S.Rep. No. 813, supra, at 8; see 5 U.S.C. §552(a)(3).

Amendment requires that notice must be given and some form of hearing be held before an order depriving a person of property may become effective.[1/] Unfortunately, neither the FOIA nor virtually any agency disclosure regulations satisfy these requirements.

A. Lack of Formal Notice Requirement

The Freedom of Information Act contains no requirement that the submitter be notified by the agency that its documents are to be disclosed. Nor do virtually any agency regulations contain such a reuqirement,[2/] although some agencies gratuitously provide such notice to submitters.[3/] Those agency regulations which do provide for notification to the submitter of a request for disclosure make such notification discretionary, conditioning the giving of such notice on an agency's own preliminary views regarding the disclosability of the document. For example, the EPA provides notice of an FOIA request only if it believes that the information is of the type likely to be considered confidential by the business.[4/] Yet the fallacy of this procedure

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1/ Mathews v. Eldridge, 47 L.Ed.2d 18, 41 (1976); Opp Cotton Mills v. Administrator of Wage and Hour Division of the Department of Labor, 312 U.S. 126 (1941).

2/ At least one court has held that no such notice is required. Pharmaceutical Mfrs. Ass'n. v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976).

3/ Would Macy's Tell Gimbel's, supra, 6 Loyola L.J. at 610.

4/ 40 C.F.R. §§2.203 and 2.204(d)(1)(i) (Environmental Protection Agency); see also, e.g., 32 C.F.R. §1285.7(b)(7) (Defense Supply Agency); 43 C.F.R. §2.13(h)(Department of the Interior); 21 C.F.R. §20.27 (Food and Drug Admin.).

is that agency personnel are often unaware of the significance of information whose disclosure has been requested and, consequently, may not notify the affected business that its documents are to be disclosed. As both courts,[1] commentators,[2] and even agencies themselves[3] have observed, agencies seldom have the special knowledge of the business or the particular industry to determine whether disclosure would be harmful; and since the disclosure of even mere fragments of information can often have significant consequences, competitive and otherwise, to the affected business,[4] an agency may simply be unaware of the presence of valuable information in a document which it proposes to release. Compounding these problems is the fact that many, although not all agencies, have no incentive to protect the confidentiality of private information[5] and are, in fact, predisposed towards disclosure;[6] thus, the possibility that

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1/ See, e.g., Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1212-13.

2/ See, e.g., O'Reilly, supra, 30 Bus. Lawyer at 1134; Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Northwestern L.Rev. 995, 998-9 (1976)(hereinafter "Reverse FOIA Suits").

3/ See, e.g., Statement of Michael James, Deputy General Counsel, Environmental Protection Agency, Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, September 15, 1977, at 7-8 (hereinafter "EPA Statement"); and FTC Statement, supra, at 3.

4/ Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1213; Note, supra, 9 Akron L.Rev. at 683-4.

5/ Westinghouse Electric Corp. v. Schlesinger, supra, 542 F.2d at 1212; O'Reilly, supra, 30 Bus. Lawyer at 1134.

6/ Patten and Weinstein, supra, 29 Ad.L.Rev. at 204.

notice may not be given and that confidential information may be unknowingly disclosed becomes even more imminent.

B. Inadequate Time to Comment

Where notice is provided, the submitter is generally afforded not more than five days and, in some cases, as few as one day, to submit written objections to disclose. For example, in Armco Steel Corp. v. Marshall,[1/] where a number of companies sued to enjoin the release of assertedly confidential, private information, the government agencies gave only five days to some of the companies to object to disclosure; as little as one day to one of the companies; and, in fact, did not notify another of the companies until the prescribed time for objection to disclosure had already passed.

Since disclosure is often a complex matter requiring analysis of copious documents and possible testimony by an expert witness, allowance of only five or fewer days for submission of comments is, in effect, a denial of a right to object at all. Indeed, some more enlightened agencies have openly admitted that the statutorily mandated ten days' time is simply not enough time for the agency to evaluate the issues in an Exemption 4 situation, let alone for the submitter to analyze the documents, obtain expert economic

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1/ No. 77-121 (E.D.Ky.).

assistance and plead its case to the agency.[1/]

C. Inadequate Hearing

Nor do agency regulations provide for a right to a hearing. While many regulations allow a company which has been notified of intended disclosure to comment upon disclosure, that opportunity is largely meaningless because (1) the submitter is given only five days or less to analyze often complex documents, to obtain the assistance of an expert witness (if necessary) and to prepare and present comments to the agency; (2) the right to comment is discretionary only, since the agency may choose not to notify the submitter at all;[2/] and (3) no opportunity is afforded to the submitter of the information to challenge the rationale or foundation of the agency's initial decision[3/] to disclose since that is not made known to the submitter.

D. Inadequate Agency Appeal

Similarly, while many agency regulations provide for an administrative appeal from an initial agency decision refusing to disclose documents, few agencies have

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1/ EPA Statement, supra, at 5. See Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit, 55 Tex.L.Rev. 587, 635 (1977).

2/ See §VI.A., supra.

3/ See Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C.Cir. 1977).

4/ Reverse FOIA Suits, supra, 70 Northwestern U.L.Rev. at 999.

established appeal procedures for a decision to disclose information.[1/] Those several agencies which do provide such a right allow only a brief period of time in which the submitter may file, and the agency must rule on, such an appeal; and, further, the appeal is generally based on an inadequate agency record. Moreover, the agency appellate bodies to which such appeals can be taken often suffer from the same pro-disclosure bias which characterizes many agency staffs. Consequently, such appeals, even where afforded, are generally little more than a rubber stamp process and the submitter has little hope of overturning an adverse initial decision.

Even where a right of appeal is allowed, some agencies refuse to delay disclosure pending completion of the administrative appeal. Since, once disclosure occurs, the disclosability of the documents becomes a moot question,[2/] the refusal to delay disclosure ultimately has the effects of denying the submitter his right to an administrative appeal and of insulating the agency's disclosure decision from judicial scrutiny.

1/ Reverse FOIA Suits, supra, 70 Northwestern U.L.Rev. at 999.

2/ Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996, 1001 n. 7 (D.D.C.), stay dissolved, 509 F.2d 527 (D.C.Cir. 1974).

E. Inadequate Opportunity to Seek Judicial Review

In response to an agency decision to disclose, a business may choose to vindicate its rights by commencing a reverse FOIA action. Yet, despite the fact that disclosure of the contested documents might moot the case, many if not most agencies refuse to delay disclosure pending the completion or even the commencement of judicial review. In contrast, Government agencies never disclose their own documents pending a requester's suit to compel disclosure. 1/

VII. RECOMMENDATIONS

Bills have been introduced in both Houses of Congress which would cure the substantive and procedural problems noted above and, equally important, eliminate the perception of governmental insensitivity to the need to maintain the confidentiality of business information submitted to federal agencies. The three principal bills currently before Congress are H.R. 3928 (introduced by Congressman Horton on June 16, 1981), H.R. 2021 (introduced by Congressman English on February 24, 1981), and S. 1247 (introduced by Senator Dole on May 21, 1981).

1/ Patten and Weinstein, supra, 29 Ad.L.Rev. at 204.

H.R. 2021 proposes changes on the procedural front, but does not address the substantive issues discussed above concerning the need for clarification of the "confidentiality" standard contained in Exemption 4 and for affirmation that Exemption 4 is mandatory in nature. On the procedural side, H.R. 2021 represents a move in the right direction but, unfotunately, one which does not go far enough. Thus, while the bill would formalize submitters' right to notice of, and an opportunity to object to, a disclosure request, it would continue the bias which now exists against submitters in FOIA proceedings both at the agency level and in court. For example, requesters would continue to be given a right to de novo review of an adverse agency disclosure decision, while submitters would be afforded only a more limited review based on the agency record; given the importance of submitters' rights and interest in the confidentiality of business information, this discrimination against submitters does not seem justifiable. The bill's preference to the requester's choice of venue over the submitter's, when both parties have sued regarding the identical records, is equally unfair and unwarranted. Finally, the bill provides only ten days within which a submitter may file objections to disclosure and makes no provision for an oral hearing where requested and warranted by the circumstances.

In contrast, S. 1247 does enlarge the time for filing objections to disclosure, does make provision for an informal oral hearing where warranted by the circumstances, and does not discriminate against submitters with respect to either choice of venue or standard of review. More importantly, S.1247 tackles the substantive issues which are at the heart of this problem by declaring (1) that Exemption 4 shall apply to information which would not customarily be disclosed by the submitter (regardless of any showing of competitive injury), (2) that Exemption 4 shall be applied on a mandatory basis unless it is shown that withholding would cause substantial injury to an overriding public interest, and (3) that the Trade Secrets Act, 18 U.S.C. §1905, shall be deemed to be a statute described in Exemption 3 of the FOIA, 5 U.S.C. §552(b)(3).

S.1247 should be enacted. By accomplishing the substantive and procedural reforms described above, it would provide to submitters of confidential business information the protection which such information deserves, and eliminate the discrimination against submitters which the present Act embodies. Moreover, by erasing the perception that agencies will not preserve the confidentiality of business records, the bill would foster renewed cooperation by those persons upon whom agencies are dependent in obtaining information necessary for the effective performance of their regulatory functions. Finally, enactment of S. 1247 to resolve the many questions left unanswered by the Supreme Court in Chrysler Corp. v. Brown, questions which, in the final analysis, require a legislative rather than a judicial solution.

Mr. RADER. Mr. Pulley.

STATEMENT OF JACK I. PULLEY, SENIOR ATTORNEY, DOW CORNING CORP., MIDLAND, MICH.

Mr. PULLEY. Thank you.

Dow Corning Corp. is a specialty chemical manufacturing firm headquartered in Midland, Mich. Our products are broadly referred to as silicones and are used in every major industry, including automotive, aerospace, medicine, and electronics.

Generally, I handle Dow Corning's environmental legal affairs; however, I am also responsible for insuring the protection of Dow Corning technology that has been submitted to various health and environmental agencies.

As you will see from my examples, I have had experience in responding to public requests for documents Dow Corning has submitted to the Government. Even though my comments today are somewhat critical of FOIA as it now exists, I must emphasize that we support the underlying public purpose of this act—that is, an open government.

In a democracy, the public has a right to know how its government operates. However, this right must be balanced against the rights of those who have a vested interest in the information they have given the Government.

My basic point this morning is that there are serious ambiguities in the present statute which encourage those who would use FOIA to serve their own private economic interests, whether they be foreign or domestic.

This abuse adds unwarranted risks and costs to our business. Further, we believe these ambiguities can be legislatively corrected without undermining the basic purpose of FOIA.

The risk of losing proprietary information through FOIA abuse was clearly illustrated to me by two recent events. The first was a publication of an article entitled "The Freedom of Information Act; Strategic Opportunities and Threats," in the winter 1978 issue of the "Sloan Management Review."

In this article, the authors described how FOIA could be used to gain—and I use their words—a differential competitive advantage.

Here is one of America's most prestigious business journals teaching the world how FOIA can serve private economic interests.

The second event which showed me the reality of this abuse was a series of four requests over a period of about 1½ to 2 years for copies of all environmental permits and supporting documents for Dow Corning's two basic U.S. manufacturing facilities.

These documents not only described the character of the environmental discharges, but they also contained production capabilities, construction cost figures, and certain critical process operating details.

Initially, one may think these requests would be the ultimate public purpose—a citizen reviewing the Government's environmental decisions. However, three of the four requests were filed by large metropolitan law firms on behalf of an unknown client, and the fourth by an environmental consulting firm acting on behalf of an anonymous client reportedly in the same line of business as Dow Corning.

We will probably never know who was seeking our documents. For several reasons, which I will describe in my written testimony, it does not appear that they were concerned environmentalists.

It is my opinion that the requester was in each case one of our present or future competitors—possibly a foreign competitor—trying to gather information regarding our facilities but much more anxious to preserve its own anonymity.

The problems with FOIA, as it is now written, are both procedural and substantive. Together they create an unacceptable degree of unpredictability in the handling of our trade secrets.

Procedurally, we have a confused situation in which it is very difficult to determine whether a given agency at a given time will or will not protect proprietary information. Let me give you another example.

A while back, Dow Corning was considering filing an application for a refund of the duty we had paid for importing a certain raw material. The U.S. Customs allowed such a refund to the extent the raw material was used in producing exports. The refund is referred to as a duty drawback.

Unfortunately, the duty-drawback application called for a detailed description of the process in which the raw material was used. To Dow Corning, these details were highly confidential and considered very valuable.

Since the agency did not have regulations completely defining their procedures for handling such requests, I telephoned the agency and eventually talked to the attorney in charge of FOIA affairs. She immediately assured me that the agency would not disclose confidential information—that is, information that the agency considered confidential.

Quite naturally, I asked how the agency would handle a situation in which the applicant considered the information confidential but the agency did not.

It took almost 1 month to get a response, and I am sure that you understand that by that time, as far as I was concerned, the response was irrelevant.

I advised Dow Corning not to file the application and risk losing this technology.

My reason was that if it took the FOIA attorney—an articulate and apparently competent individual—almost 1 month to find an answer, I had no assurance that the frontline employees actually responding to FOIA requests would be aware and sensitive to this problem.

Our loss was about $10,000 from the duty drawback and a few thousand more in lost time, effort, and energy. This is an unnecessary cost caused by FOIA's failure to require a uniform and complete procedure for all agencies to follow.

The substantive ambiguity lies in the competitive harm test of the national parks case. This places an often impossible burden on the original submitter to prove that the release of the information is likely to cause competitive harm. Again, an example.

There are many pieces of information, such as plant capacity, process rates, production rates, and certain process operating parameters which are neither patentable nor within the traditional

definition of a trade secret, but which we consider very confidential.

The reason for our concern for such information is that our competition may be able to use this information to unfairly reduce the normal risk of doing business, but this is a very difficult thing to prove—even more difficult for us to learn about.

Our competition does not tell us what they know of our operating processes. It is not evident in their product, and it is not evident from any single act that they may take.

In summary, we believe that S. 1247 corrects both the procedural and substantive laws in FOIA—again, without undermining its basic purpose.

I plan on submitting a more detailed written statement, but I would be happy to answer any questions you may have at this time.

Mr. RADER. Thank you very much.

[The prepared statement of Mr. Pulley follows:]

Prepared Statement of Jack Pulley

My name is Jack Pulley; I am a senior attorney with Dow Corning Corporation, a speciality chemical manufacturing firm. Our products are broadly referred to as silicones and are used in every major industry including automobiles, aerospace, medicine and electronics. Generally, I handle Dow Corning's environmental legal affairs; however, I am also responsible for ensuring the protection of Dow Corning technology submitted to various health and environmental agencies. As you will see from my examples today, I have had experience in responding to requests for documents Dow Corning has submitted to the government and, therefore, I am very interested in the Freedom of Information Act (FOIA) - the subject of this hearing.

Even though my comments today are somewhat critical of FOIA, as it now exists, I must emphasize that we support the underlying public purpose of this Act - that is, an open government. In a democracy the public has a right to know how the government operates. However, this right must be balanced against the rights of those who have a vested interest in information they have given the government.

My basic point today is that there are serious ambiguities in the present statute which encourage those who would use, I should say abuse, FOIA to serve their own private economic interests. This situation adds unwarranted risks and costs to our business. Further, we believe these ambiquities or flaws can be legislatively corrected, without undermining the basic purpose of FOIA.

The risk of losing proprietary information through FOIA abuse is very real. This was clearly illustrated to me by two recent events. The first was the publication of an article entitled "The Freedom of Information Act; Strategic Opportunities and Threats", in the Winter, 1978 issue of the Sloan Management Review. In this article, the authors described how FOIA could be used to gain (and I use their words) "a differential competitive advantage". Here is one of America's most prestigious business journals teaching the world how FOIA can be used to serve private economic interests. Such abuse is contraty to both the American way of doing business and the original purpose of FOIA.

The second event which showed me the reality of this abuse was a series of four (4) requests, over a period of about a year and a half, for copies of all environmental permits and supporting documents for Dow Corning's two basic U.S. manufacturing facilities. These documents not only described the character of the discharges to the environment from those facilities, but also contained production capacities, construction cost figures, and certain process operating data.

Initially, one may think these requests would be the ultimate public purpose - a citizen reviewing the government's environmental decisions. However, three of the four requests were filed by large law firms on behalf of an unknown client and the fourth by an environmental consulting firm acting on behalf of an anonymous client reportedly in "the same line of business as Dow Corning".

Two Dow Corning experts and I had to make several trips to discuss with the agencies how they would respond to the requests. In each case, the agencies ultimately agreed with our appeal to withhold certain information and in each case no further word was heard from the requestor.

We will probably never know who was seeking our documents, but it does not appear they were concerned environmentalists. First, an environmental group would not normally hire lawyers to file a request they could file themselves; and secondly, if they were truly concerned about some aspect of our facilities, why would they not pursue the requests further? Their lawyers would have advised them of their legal recourses and it would be surprising that costs should become a factor so quickly.

It is my opinion that the requestor was (in each case) one of our present or future competitors trying to gather information regarding our facilities but more anxious to preserve their own anonymity.

The problems with FOIA, as it is now written, are both procedural and substantive. Together they create an unacceptable degree of unpredictability in the handling of our trade secrets.

Procedurally, the statute does not set forth a uniform and complete approach for agencies to follow in handling FOIA requests for proprietary information. Therefore, as you would expect, each agency has a somewhat different policy which may or may not be completely codified in regulations. As a result, we have a confused situation in which it is very difficlut to determine whether a given agency, at a given time will or will not protect proprietary information. Let me give you a specific example.

A while back, Dow Corning was considering filing an application for a refund of the duty we had paid for importing a certain raw material. The U.S. Customs allowed such a refund to the extent the raw material was used in producing exports; this refund is referred to as a duty-drawback. Unfortunately, the duty-drawback application called for a detailed description of the process in which the raw material was used. To Dow Corning, these details were highly confidential and very valuable.

Since the agency did not have regulations completely defining their procedures for handling FOIA requests for confidential information, I telephoned the agency and eventually talked to the FOIA attorney. She immediately assured me that the agency would not disclose confidential information - that is, information that the agency considered confidential.

Quite naturally, I asked how the agency would handle a situation in which the applicant considered the information confidential but the agency did not.

Actually, I had two questions. First, would Customs notify Dow Corning of an FOIA request for our duty-drawback application if Customs did not agree that it contained confidential information; and secondly, would it be possible to obtain a binding determination of whether this application would be entitled to confidential treatment prior to Dow Corning's submitting the application.

Apparently, both were novel questions and it took almost a month to get an answer.

I am sure you can understand that by that time, as far as I was concerned, the answer was irrelevant. I advised Dow Corning not to file the application and risk losing this technology. My reason was that if it took the FOIA attorney almost a month to dig up an answer, I had no assurance that the front line employees actually responding to FOIA requests would be aware and sensitive to this problem.

Our loss was about $10,000 from the duty-drawback and a few thousand more in lost time, effort and energy. This is an unnecessary cost caused by the FOIA's failure to require a uniform and complete procedure for all agencies to follow in handling these matters.

Now, the substantive ambiguity lies in the "competitive harm" test set forth in the National Parks Case* decided in the District of Columbia. This case law places a difficult, and sometimes impossible, burden on the original submitter to prove that the release of the information is likely to cause competitive harm.

Again an example - there are many pieces of information such as plant capacity, production rates and certain process operating parameters which are neither patentable, nor within the traditional definition of a trade secret, but which we consider very confidential. The reason for our concern for such information is that our competition may be able to use the information to unfairly reduce their normal risks of doing business.

This is a very difficult thing to prove.

In summary we believe, that S. 1247 corrects both the procedural and substantive flaws in FOIA without undermining its basic purpose.

More specifically, S. 1247 would set forth a uniform and complete procedure for all agencies to follow in handling FOIA requests for business information. This would significantly reduce uncertainty and agency unpredictability, and thereby discourage those who would use FOIA to gain "a differential competitive edge." More importantly, S. 1247 would provide a clear substantive standard to judge whether a given piece of information would fall within the confidentiality exemption and limit an agency's discretion to disclose such information.

In addition to reducing undue risks and costs, we would expect S. 1247 to facilitate our relations with various federal agencies since it would no longer be legally necessary to assume a somewhat adversarial posture and scrutinize each agency request for information and challenge such requests where it appeared there was inadequate protection for competitively-sensitive information.

We plan on submitting a more detailed written statement but I would be happy to answer any questions you may have at this time.

*National Parks and Conservation Association vs. Morton, 498 F2d. 765 (C.D. Cir., 1974)

Mr. RADER. The subcommittee has certain questions it would like to pose to this panel.

Mr. Braverman, you mentioned in your testimony that you advised your clients not to cooperate with the Government in sharing information with them. Are other businesses following this kind of advice? If so, is this harming the Government's ability to gather information?

Mr. BRAVERMAN. My general impression is that this is advice that other private counsel are giving to their clients, and that this is advice that other companies are following.

The obvious effect, of course, is that Government programs which depend upon securing data and cooperation from regulated companies are suffering in several respects. Where data is lost, the basis for Government action is narrowed and sometimes made inadquate. Where data is made more difficult to obtain, it makes the process of Government regulation more difficult, more time consuming, more expensive, and more inefficient.

Certainly, it seems to me that the loser is the public.

The answer to your question, then, is yes; other companies are being forced to follow this approach.

I would add, as I stated in my testimony, that it is advice that we would rather not have to give. It is advice that these companies would rather not have to follow, and would not have to follow, if adequate protection were incorporated into the act.

Mr. RADER. Thank you.

Mr. Pulley, at one point in your testimony, you mentioned that you had advised your client to withhold information in regard to a duty drawback. Is your statement to the subcommittee similar to that of Mr. Braverman—that such advice could have some impact on the Government's ability to gather information?

Mr. PULLEY. Yes; it is.

The uncertainty which causes Mr. Braverman to so advise his clients has two impacts. The first is that it adds an adversarial element to our relationship with the agencies.

As an attorney, as I indicated in the customs example, I cannot accept blanket promises of confidentiality. I have to dig further and ask questions until the issues are clearly resolved.

Until those issues are resolved, I cannot advise Dow Corning to submit the information.

In addition, it focuses attention away from the substantive issue at hand, causing delays which are unwarranted and costly.

Mr. RADER. Mr. O'Reilly, S. 1247 amends exemption 4 to include information which would not "customarily be disclosed to the public by the person from whom it was obtained."

How would this standard be determined? Would the court look to what is customary for the industry or would it be required to accept the claims of the submitter that the information is customarily withheld by him? To whom does "customarily" refer—the industry in which the submitter participates or the submitter himself?

Mr. O'REILLY. It refers to the submitter's practice as established by the submitter's statement to the agency that the submitter customarily does not disclose it. It carries through the principle

that Professors Marthinsen and Casey discussed last week of information that is circumstantially relevant to the business.

If I may give you an example.

Mr. RADER. Please do.

Mr. O'REILLY. There has been a peanut shortage, as everyone knows from buying peanut butter. We import a great deal of peanuts from different countries than we have in the past because of other crop situations being what they are.

There are various sources of peanuts which are opening up now that were not available for economic reasons before.

We might not be able to prove to a court that there was substantial harm to our competitive position if persons were able to know—one of our competitors—which sources of peanuts we were using at any particular time and in what volume.

Those import documents are circumstantially relevant business information, although they are not truly trade secrets. We customarily do not disclose them. They may be disclosed by other peanut butter manufacturers under their circumstances, but under ours they are extremely important to our position.

We believe it is appropriate that the circumstance be appropriately tied to the submitter's situation, with the override that if there is clear and convincing information that the failure of the agency to disclose those records would seriously injure an overriding public interest, then that practice of confidentiality on the part of the submitter would be overridden by the overriding public interest.

Mr. RADER. Thank you.

Could you describe the scenario in which the information protected by S. 1247's substantive standard would be unprotected by the National Parks' competitive harm standard?

Mr. BRAVERMAN. An example of that might be a new process or technology. Let us say that a computer company was developing a new product for which there is no current market. There may be no current customers; there may be no current competitors for that product; and there may be, therefore, no ability on the part of that company to demonstrate in court that disclosure of that technology or process by an agency would cause competitive injury, let alone substantial competitive injury. Yet in 5 years or 5 months down the road that new product or process may be an extremely valuable piece of competitive information, because at that point the market may develop.

The communications industry, for example, is a prime example. Several years ago, fiber optics was a technology which was relatively unknown, for which there was little, if any, market. It would have been very difficult at that point to demonstrate that competitive injury would be caused by disclosure of such information.

Yet today the information has now become highly valuable in a competitive sense because the market for fiber optics has developed explosively. When tied to competition, however, it would not have been protected under that standard several years ago.

That is why I believe a broader standard of protection under the exemption is necessary. Reliance upon an artificial notion of competitive injury ought to be abandoned.

Mr. RADER. Thank you.

The Administrative Procedures Act now limits judicial review of an agency decision to the paper record of the administrative judge. S. 1247 would favor giving de novo review rather than limiting review to the agency's paper record. What makes the disclosure situation different from other situations where the agency builds a record which is used for review? Why does S. 1247 recommend de novo review?

Mr. O'REILLY. I think we have a difference in time and focus between the normal review of section 553 proceedings and the review of a particular problem on disclosure.

The time available for generation of a record in a normal 553 proceeding includes an agency proposal and a preamble of the agency's reasons, a period of comment, often a period of meetings, and a final agency proposal which is then reviewed upon that complete record.

In the disclosure case, there is often one letter submitting a piece of information along with the confidentiality claim. There is a letter from the agency in some cases—not in the Food and Drug Administration's case.

The letter from the agency says: We are going to disclose this information on a certain date. The response back from the company says: We object for these reasons. The response back from the agency says: We are going to disclose it on this date, and we disagree.

Those four letters generated within the period of perhaps 10 or 20 days are the complete administrative record. We feel that is significantly insufficient and that de novo review will generate the necessary information upon which the court can make its basic decision.

We also feel it is insufficient to say that there should be arbitrary and capricious review of those four letters alone and that there should be a remand to the agency for any further development, because we feel that the person who is submitting the information senses that the agency has already made up its mind and is going to be building the paper record on remand strictly to support its already made decision.

Whereas, an impartial Federal judge, using a de novo standard, accustomed to hearing evidence impartially, will give a much more fair and open hearing to the arguments of the submitter.

Mr. RADER. Has that been your experience, Mr. Braverman?

Mr. BRAVERMAN. My experience has been that the agency process has generally been inadequate, because of both a lack of time and a lack of expertise on the part of the agency officials who are involved in making these disclosure decisions.

It is also due to the fact that there is an insensitivity that has been literally beaten into these agency representatives, in terms of a bias in favor of disclosure and a belief that, the exemptions are not to be vigorously enforced.

I have also come to the conclusion that, in comparison between de novo review and a review that would be limited to the agency record, the courts are indeed more likely to reach a conclusion that information is legitimately entitled to protection if they are given an opportunity to take a fresh, complete, and thorough look at the

information rather than if they are limited to a record that has been developed at the agency.

One of the problems that I have found is that agency records are seemingly often developed in the agency to justify a disclosure decision that has already been reached, rather than developed in the process of deciding whether or not to disclose. Therefore, if the record that reaches the district court is rather biased, it creates an inadequate basis for the court to conduct a review.

Mr. RADER. Do you find, Mr. Pulley, that agency records attempt to cover over the earlier decision to disclose records?

Mr. PULLEY. There is usually not an administrative law judge involved in this.

As far as Dow Corning is concerned, we have not been involved at that level; however, we do see two problem. First of all, the requester under FOIA, as it now exists, has de novo review. It is difficult to understand why one side in this adversarial process should have that right and the other be limited to judicial review on the record.

Second, I would note there is a clear precedent for providing de novo review to be found in the patent system. Some analogies can be drawn to the patent system in this area, since the ultimate purpose of both our concern for confidential information and the patent system is to encourage innovation by protecting confidential information.

If a patent applicant is denied protection under the patent system for his or her invention, there is a right to go to district court and seek de novo review. We feel this analogy is valid and a submitter should also have de novo review of an agency's decision to release information to an FOIA requester.

Mr. RADER. Thank you.

Last week, the subcommittee took very excellent testimony from Prof. Russell Stevenson of George Washington University.

If I can remember the crux of his statement, he said that actual disclosure of trade secrets and confidential business information is not really a problem, that the problem is merely a preceived difficulty. In his opinion it is only perceived, not actually proved, that industrial espionage is occurring. He stated that he had not found any instances of trade secrets being disclosed under the Freedom of Information Act.

That seems to be different from the testimony which you gentlemen have supplied today. Could you reconcile that difference?

Mr. BRAVERMAN. The testimony given by Professor Stevenson took issue with some of the so-called horror stories that have been reported in the media and that have been cited at various times in testimony.

The horror stories concern instances where valuable technology has been lost, either to competitors, to foreign businesses, or to others who are not entitled to access to that information.

The answers to your question are threefold.

First, there indeed are horror stories that have taken place, causing substantial losses of technology—very costly losses.

Second, I think that there are probably more of these stories than we know about. When companies, for example, are not entitled to notification of a request for disclosure, they may not even

know that their information has been previously disclosed and that that information has been lost.

Thus, I think, first, that there are horror stories, and second, that there are probably more than we know.

However, I think that the most important point is that this is the wrong focus. I would urge that the subcommittee not be entrapped by that focus. We do not need a body count, it seems to me, to come to the conclusion that an amendment to the act is necessary. You do not wait until there is a Three Mile Island to enact nuclear safety legislation.

What you do, in fact, is to conduct a careful study of the situation, and careful studies of exemption 4 have been done. The Sloan Management Review and the Babson College Economic Study have concluded that the Freedom of Information Act can be used, and is being used, to gain competitive advantage in this field. It is a strategic advantage that can be gained by one competitor over another.

When you have those kinds of conclusions being reached after lengthy and careful studies by respected institutions, you do not have to look for one, two, or six particularly gruesome horror stories.

The basis for legislative action is here already present and I would urge the committee not to get entrapped in that narrow focus.

Mr. RADER. Are there any other comments on this problem from the other witnesses?

Mr. O'REILLY. I endorse Mr. Braverman's comments. I have talked at length with the economists about their interviews.

I also feel, as the economists reported, that there are significant reasons why persons would not report horror stories and why they would not wish their competitors to know.

Professor Stevenson later spoke at the Thursday House hearings. In response to a question by Congressman Kindness, he said that there were reasons of damage control and reasons of damage limitation for why a person would not wish to go on the public record with a particular incident in which that person had lost confidential business information.

I feel his Thursday comments amplified, and to a certain extent, clarified his comments before this committee last Wednesday.

Mr. RADER. One final question.

The most controversial aspect of S. 1247 is perhaps the change in the substantive standard—the change in exemption 4. Would you foresee an instance where information vital to the public might be withheld from disclosure under the customary standard of S. 1247?

Mr. O'REILLY. I have looked, for example, in the Food and Drug Administration's logs for a particular week. I have found in a period of 7 days five requests which I would consider public—press and legitimate public requests—and several hundred requests from business and blind search submitters.

If there were five requests made by a public interest and a media person, I think those five requests would be much more likely to get attention. The overriding public interest of those requests would be much more seriously weighed by the agency if the sub-

stantive standard were changed so that the hundreds of commercial requests would disappear or evaporate or diminish in number.

The overriding public interest would, I feel, be balanced by the agencies more fairly. More evidence about that public interest would be developed and considered by the agencies if there were a decline in the number of business requests.

Mr. RADER. Mr. Pulley, do you have a comment?

Mr. PULLEY. Looking at the safety valve of the overriding public interest, from our viewpoint, we see that should the requester raise the public interest issue, at that point the identity and the purpose of the requester would have to be disclosed to and considered by the agency and eventually possibly even by a court. This would greatly discourage the commercial use of FOIA.

Mr. RADER. Thank you, gentlemen. We appreciate the expertise which you have brought to the subcommittee on this subject.

[The Sloan Management Review article follows:]

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The Freedom of Information Act: Strategic Opportunities and Threats

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Increasing business use of the Freedom of Information Act (FOIA) poses both strategic opportunities and threats at the competitive and governmental interfaces. Used skillfully, the FOIA represents a potential management tool to gain some differential competitive advantage. However, as the authors of this article emphasize, managers must be aware of the defensive as well as the offensive implications of the FOIA. They conclude with a number of specific action implications of the FOIA for the practicing manager. *Ed.*

Although the Freedom of Information Act (FOIA) was primarily intended as a means of access for individuals to personal information in the files of government agencies (e.g., the FBI and CIA), business has increasingly utilized the Act to obtain strategic intelligence from the Federal government relating to both competitors and government policy formulation processes. Consider the following examples of successful FOIA use by business.

- Air Cruisers, Inc. achieved a clear competitive advantage when the Federal Aviation Administration (FAA) approved its design for a 42-person inflatable life raft, the largest size to gain FAA approval. Although Air Cruisers believed that the critical design and testing data it had submitted to the FAA were confidential, only a short time later a competitor used the FOIA to obtain portions of the submittance which, according to the competitor's research and development director, helped the competitor design its own large raft and win a substantial contract away from Air Cruisers.[1]
- The Chessie System (B&O and C&O Railroads) obtained from the Interstate Commerce Commission statistics on freight cars bought and retired each year by other railroad lines, thereby obtaining knowledge of competitive capacity and the age distribution of competitive assets.
- Mobil and Exxon used the FOIA to obtain certain correspondence

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[1] See Schorr [7].

between Federal Trade Commission staffers and Congress concerning petroleum and petroleum products.

• Hoffman-LaRoche acquired three Food and Drug Administration (FDA) instruction manuals for establishment inspectors. These manuals could be used to gain insight into current FDA inspection policy as well as perhaps to suggest competitive information which might be obtained from the FDA under a further FOIA request.

• Westinghouse obtained from the Department of Commerce ten reports, paid for and submitted by other corporations, on how Japanese nontariff barriers hurt sales in Japan.

• A lawyer for an unnamed client used the FOIA to acquire an FDA inspector's report on a large pharmaceutical company's plant. The report yielded competitively sensitive information such as a description of proposed new products, manufacturing capabilities, and sterilization procedures at the inspected plant.[3]

Before the amended FOIA went into effect in February 1975, it is unlikely that any of the companies noted in the examples above would have received the information requested. The amended FOIA replaced a long-term Federal government philosophy emphasizing secrecy with a law based on the right of every individual to clear access to agency records without having to state a reason for requesting the information. Exemptions from disclosure are fairly specific and are discretionary.

In the long run, as the FOIA becomes better known and more often used by corporate managers, it may have a substantial impact on the availability of competitive information and on the government-business interface. The FOIA will be another means for monitoring the competitive, political, and regulatory environments. In the short run, managers who are aware of both the opportunities and threats posed by the FOIA should be able to gain differential competitive advantage and at the same time better protect their own companies from prying competitors and government personnel.

The remainder of this article is divided into five major sections: (1) a brief overview of the FOIA and its historical development; (2) an examination of its impact in two major Federal agencies; (3) an analysis of its impact on the competitive environment; (4) an assessment of its implications for the government-business interface; and (5) action recommendations for companies. The substantial use of the FOIA in litigation will not be explored at any length in this article.

The What and How of the FOIA

The original FOIA was passed in 1966 and went into effect a year later on July 4, 1967. The Act emerged from the functional inadequacy as a public

[3] See Schorr [7].

information law of the Administrative Procedure Act (APA) of 1946, which contained the first general statutory provision for public disclosure of Federal records. The original FOIA was not wholly self-explanatory and far from self-executing. Agency implementation response was diverse with regard to both philosophy and mechanics. In general, traditional tendencies against disclosure of information which might reflect the judgment of Federal officials or illuminate the public-private sector interface were maintained. An extensive review of the Act culminated in 1974 in an amended FOIA which went into effect in February 1975. The FOIA was further amended by the Government in the Sunshine Act, effective March 1977, which limits the usage of exemption three (see below) by such agencies as the FAA which claimed that a substantial portion of their records was exempt by statute.

The amended FOIA provides that any person has the right of access to, and can receive copies of, any record in the possession of a Federal agency, subject to nine specific exemptions. These include matters that are:

1. Specifically authorized and properly classified as secret in the interest of national defense or foreign policy;
2. Related solely to the internal personnel rules and practices of an agency;
3. Specifically exempted from disclosure by statute;
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. Inter-agency or intra-agency memoranda or letters not otherwise available by law except to an agency in litigation with the agency;
6. Personnel, medical, and similar files whose disclosure would constitute an invasion of privacy;
7. Under some circumstances, investigatory records compiled for law enforcement purposes;
8. Records related to the regulation or supervision of financial institutions;
9. Geological and physical information and data, including maps, concerning wells.

The exemptions are discretionary; thus an agency may release records, even if they fall within an exemption, if there is no compelling reason for withholding them. Often a requester will argue that it is in the public interest to release certain information even if it could be exempted. For example, after General Pants, a former retailer of Levi products, brought an antitrust suit against Levi-Strauss, it requested that certain information that the FTC had on Levi-Strauss be made available to General Pants. One of the reasons given was that General Pants, as a small company, could not afford to gather the information to move forward with its suit and, consequently, it was in the public interest to make this information available to General Pants.

Two aspects of the 1974 amendments are of particular operational

significance. One, except in extraordinary circumstances, the Federal agency must either grant or deny an FOIA request within ten working days and an appeal within twenty working days. Thus, time horizons are short (though actual receipt of requested material may be delayed — often by months). Two, if portions of a document are covered by one of the nine exemptions, the entire document is not exempt from release, only the exempted portion. For example, when an FOIA request was made by the authors for the computer listing of all 1976 FOIA requests to the FTC, the list received had scissored cutouts which represented inter-agency and intra-agency requests protected by exemption five. Furthermore, while the Federal government can charge for search time and copying documents, it cannot charge for the time to review documents for exemption and to excise protected portions. Moreover, the FTC's 1976 annual FOIA report to Congress indicated that, in practice, fees are not ordinarily charged if the requested records are not found or if all records found are withheld as exempt.

Although a detailed review of the law and its exemptions will not be made here, exemption four, which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure, is a major source of ambiguity. In order to bring a record under exemption four, it must be shown that the information is (a) a trade secret or (b) information which is (1) commercial or financial, (2) obtained from a person (not agency generated), and privileged or confidential. Business, agency, and judicial interpretations of "trade secret," "commercial and financial information," and "confidential" have been varied and have given rise to the phenomenon of the "reverse FOIA suit" in which a person — usually a corporation — who has submitted information to the government seeks an injunction against its disclosure.

A Tale of Two Agencies

In order to indicate the diverse impact of the FOIA, two agencies,[3] the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC), are examined. The FTC has the broadest mandate of any Federal agency as an industry watchdog and regulator; the FDA has a regulatory mandate over significant and relatively homogeneous industry groups. In particular, the drug industry is unique in American industry in having both its marketed products and its research on new products under Federal regulation.

As can be seen in Table 1, both agencies have seen a substantial increase in the number of FOIA requests. The FDA's increase has been particularly explosive with over 20,000 requests in 1976. What are the differential characterizations of the FDA and the FTC that promote the differing request patterns and agency response characteristics shown on Table 1? A substantial element in differential industry usage is due to

	FTC	FDA
Volume of Initial Requests		
1974	100 (est.)	2,000
1975	529	13,052
1976	690	21,778
Characteristics of Requestors (1976)		
	49% Attorneys 23% Industry	37% Industry 34% FOIA Service Companies
Disposition of Requests (1976)		
Denied in Full	24%	1%
Denied in Part	40%	N.A.
Withdrawn	4%	N.A.
Exemption Invoked for Denial** (1976)	764	309
Exemption 4 (Trade Secrets, Commercial or Financial Information)	19%	39%
Exemption 5 (Intra- or Inter-Agency)	31%	9%
Exemption 7 (Investigatory Records)	43%	47%
Appeals to Agency (1976)	133	24
Granted in Full	22%	8%
Denied in Part	53%	17%
Denied In Full	25%	75%

Table 1 Characteristics of FOIA Usage in Two Agencies — the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA)*

* Except for the characteristics of requestors, the data sources are the agencies' annual reports to Congress as mandated by the FOIA. Characteristics of requestors are based on internal agency records. For the FDA, characteristics of requestors are available only for the first half of 1976.
** More than one exemption can be invoked on a request. Those listed are the most cited exemptions.

indexing. The FTC has a large but ill-defined body of information available; the FDA has a large but well-defined body of information available.

The drug industry and its primary trade association, The Pharmaceutical Manufacturers Association, are aware of the FOIA and have moved to incorporate it into their portfolio of scanning mechanisms. A "cottage industry" of small information service companies has grown up as a middleman to organize, transmit, and often act as a cover for thousands of drug industry FOIA requests to the FDA.

In contrast to the FDA, nearly half of the FOIA requests made to the FTC are by attorneys and appear to be primarily made to gather information for litigation. The vast purview of the Agency and minimal Agency indexing restrict broad usage. Currently, only those organizations most informed with regard to the type of information the FTC gathers and the reports it generates have been able to use the FOIA for intelligence purposes.

The relatively high denial rate at the FTC probably reflects the nature of the FOIA requests. Many of the requests are made by attorneys on behalf of clients who are in an adversary position to the FTC and thus may be seeking highly sensitive information. In such a setting, given the low cost of making an FOIA request, it would seem reasonable for attorneys to ask for more information than they might expect to obtain. At a minimum such a request could divert an FTC attorney from developing his or her case, and at best, it could provide unexpected useful information. The low denial rate at the FDA is somewhat deceiving because it does not include the many deletions not noted as denials-in-part which may often limit a document's value.

In summary, use of the FOIA within the FDA has become a routine part of the environmental surveillance system of the pharmaceutical industry. Industry in general, however, has not yet adapted to the potential value of the FOIA.

Impact of the FOIA on the Competitive Environment

The Federal government is an active collector and processor of vast amounts of information about myriad aspects of American life. The intensity of information gathering has become so great that a Commission on Federal Paperwork has been created to examine ways to reduce the burden. In testimony before this Commission, the chairman of Eli Lilly stated that his company prepares 27,000 government forms or reports a year at a cost of $15 million. One Lilly new drug application contained more than 200,000 pages and weighed more than a ton.[3]

Until the amended FOIA went into effect, the government had acted like a secret and restrictive library or storehouse of information, with most information available to the public only in summary form in the substantial volume of published government documents and reports. The confidential business, personal, and technical information that the government gathers had been largely restricted to internal government use and summary statistics. Thus, business could provide confidential information to the government and be relatively certain that the specific information would not be seen by competitors.

The FOIA, however, has transformed the government into a library with more open and fewer closed stacks. Although the nine exemptions protect many categories of information, the FOIA's importance lies not in what it protects but in what it makes available. In a sense, the FOIA has created an involuntary communication channel between businesses. Thus, much of the information that businesses provide, willingly or unwillingly, to the government has become accessible to competitors through this more open government library.

[3] See Wood [9].

What are the implications of this involuntary communication channel or newly available library of competitive intelligence for the manager?

1. The primary value of the information to be gained about competitors under the FOIA tends to be strategic in nature.

There are several reasons why FOIA information is not as useful for input to tactical decision making. First, most government information gathering is retrospective, focusing on past actions. Second, use of the FOIA can require months of calendar time between the request and the actual receipt of information. (The ten-day period refers to time to make a release decision, not time to release information.) And third, the value of tactical information decays rapidly. Thus, the time delays in the system tend to bias the value of FOIA information toward longer-run strategic issues.

2. There can be significant differential offensive advantage to companies which make use of the FOIA and the opportunities it provides.

The Air Cruisers case cited earlier provides a clear example of potential offensive competitive advantage through use of the FOIA. The authors recently completed a personal interview survey of more than one hundred executives on the topic of strategic intelligence systems. Fewer than 10 percent realized that the FOIA could have a potential impact on their business affairs and only one had made an FOIA request. Differential knowledge of the FOIA and how to use it, although a transitory phenomenon, will probably provide potential offensive advantage for the next few years. Business use of the FOIA has not become widespread except in the pharmaceutical industry.

3. Companies must actively plan the defense of confidential information submitted to the government from release to competitors.

There have been some unfortunate company errors because company personnel have been too candid with government officials. One company, for example, found that its plant managers enjoyed talking at length to Occupational Safety and Health Agency (OSHA) inspectors about their latest product and process innovations. Only too late did the company learn that this information became part of an OSHA inspection report which can be obtained by an FOIA request. The company has now instituted internal regulations that limit superfluous comment by plant managers and other corporate officials.

Although there is always the chance of an inadvertent disclosure or leak by unknown sources, the primary concern is release of information through the exercise of agency discretion in carrying out the mandate of the FOIA. A government official may not recognize the competitive significance of information out of context. In fact, most agencies tend to place the burden on the corporation to defend the confidentiality of particular records.

Defensive action steps should be considered in the context of a ten-day response time to a requestor required by the FOIA. Ten-days notice makes

effective submitter response difficult without substantial prior planning. Some suggestions of measures which should be considered include both an internal information system and careful attention to the format of submission to agencies. All submissions to Federal agencies should be carefully segregated so that confidential material is noted. Although not binding on an agency official, such a system at least provides a red flag. A company should consider developing an information system to monitor and control its confidential submissions. This system would probably include detailed records of confidential information submitted to each agency (e.g., the estimated value of specific information or types of information, portions of which have been publicly disclosed in some manner, and internal security measures applied to documents), and a comprehensive file on each agency which receives confidential information (e.g., agency regulations, statutory provisions, policy statements, past records on disclosure, and relevant advisory opinions). In some cases, "guesses" as to who is likely to request confidential data may be helpful, as arguments to counter one potential requestor may not be useful against others. Finally, a company should consider the development of priorities for confidential data so that defensive efforts may be focused upon the key issues. Such priorities may be useful in settlement negotiations and in determining the level of effort to expend in defense of an issue.

An explicit agreement with an agency either to protect confidentiality or to give ample notice of intended disclosure is helpful, especially when both parties agree on the specification of the confidential material. However, these agreements can sometimes be violated. For example, the SEC has released information concerning illegal or dubious foreign payments which companies had voluntarily supplied to the SEC under a promise of confidentiality.[4] If promises of confidentiality are not kept, however, voluntary agreements will become of limited value and government officials will probably experience increased difficulty in obtaining useful, but not mandatory, data. Note, however, that short shrift is usually given to after-the-fact special pleading to keep information confidential.

The final defensive action is a "reverse FOIA suit" in which the provider of information to the government seeks an injunction to prevent disclosure of that information. For example, when the FTC was about to grant General Pants's FOIA request for information concerning Levi-Strauss, Levi brought a reverse FOIA suit against the FTC to halt disclosure. (Levi subsequently won its suit.) In general, the reverse FOIA suit should be considered as a last resort. As a tactical weapon, however, it may serve to delay the release of information even if the court suit is ultimately unsuccessful.

Of additional interest in relation to the competitive environment is the fact that under the FOIA there is less protection for historical corporate

[4] See Hershey [4].

information in the hands of government agencies. Although no all-purpose time rule has been established, some government agencies seem to regard data more than three to five years old as generally having no competitive value. For example, in the Federal government's antitrust suit against the major cereal manufacturers, the judge ruled that documents more than five years old are open to public inspection. Thus, the cereal brand marketing plans for Kelloggs, General Foods, General Mills, and Quaker Oats for several years through 1971 were available early in 1977. The value to a competitor of having such corporate history available is problematic. Although the actual decisions themselves may be of limited value, a study of past patterns of decision making may provide insights which might be useful in predicting future responses. Certainly substantial insights into IBM's decision processes were revealed in the Telex case. Further, access to the decision processes of several competitors should afford the basis for better understanding of oligopolistic interdependencies. In addition, availability of this information may provide the foundation for the development of competitive marketing models within the context of marketing information systems.[5]

In summary, the FOIA has created an involuntary communication channel among competitors. In the short term, this may provide a differential advantage to those most able to exploit this channel while at the same time protecting their own information. In the longer run, the FOIA may raise the general level of available competitive information.

The Government Environment

The 1975 Fortune 500 survey of chief executive officers noted that the major concern of a majority of executives was dealing with the Federal government. The executives complained about the difficulty of anticipating government actions and understanding the government decision-making process.[6]

The FOIA and other recent laws, such as the Government in the Sunshine Act and some state sunshine laws, should at least increase the information flow between the private and public sectors prior to the announcement of government policies and regulations. The Sunshine Act, for example, declares that the government's policy is to allow the public to have "the fullest practicable information regarding the decision making processes of the Federal Government." The Act requires that most meetings for a large class of government bodies (those headed by two or more people appointed by the President, e.g. the SEC and FAA) be open to the public. Because the Sunshine Act is a relatively recent phenomenon, it is

[5] Thus FOIA will facilitate the fulfillment of the forecast made by Montgomery and Urban [6] in 1970 regarding competitive modeling.

[6] See Burk [2].

not yet clear what impact it will have. It may be that, just as with the original 1966 FOIA, further amendment is required before substantial changes in practice occur. (Popular press stories with titles such as "Sunshine Act Gets Clouded Results" have begun to appear.)[7]

The FOIA and the Sunshine Act, by making government decision making more visible, may lead to better understanding of that process and indicate areas where a proactive approach by business may have a substantial impact. Increasingly, businesses are finding that it is insufficient just to understand and react to government policy pronouncements. In many cases, it is also critical to understand an agency's point of view as a policy is in the formative stages. An effective proactive policy requires that the overall decision-making process be understood from the standpoint of both the substantive side of the issue as well as the process implications. For example, as reported in a *Business Week* article in early 1977,[8] Philip Morris, Inc. negotiated a sale to Bic Pen Corp. for its American Safety Razor (ASR) Division which competes against Gillette in the "wet shave" market. Philip Morris had apparently decided to put its emphasis on some of its other businesses (e.g., beer and tobacco), while Bic was apparently considering entering the razor market in an aggressive manner because of the complementarity of the marketing and distribution systems for its disposable lighters and pens. ASR would thus provide a critical mass for Bic's entry into this business. Shortly thereafter, it was reported that Bic had decided to withdraw from the transaction in response to a number of restrictions that the FTC sought to impose so as to prevent an anticompetitive situation. Subsequently, Philip Morris announced closure of ASR's main plant. Although the government can be criticized for not anticipating this result, it is possible that a proactive policy which emphasized a participative approach in the FTC decision-making process could have altered the outcome.

The need for management understanding of agency decision processes may be further illustrated by noting the way market research may be viewed by the FTC at different stages in its advertising review process.[9] Research data which may discourage further FTC pursuit of a complaint in an exploratory phase may well be used against a company by the FTC in litigation. For example, summary statements of product benefits may have to be literally defended at the litigation stage.

Although largely unrecognized in the legislative history of the Act, a potentially important implication of the FOIA is its long-run impact on government decision making. The government has traditionally been reluctant to reveal its decision-making processes. A prime example is the history of the FOIA. The testimony in support of the amended FOIA

[7] See Schorr [7].
[8] See [3].
[9] See Baumwoll [1].

reveals many episodes of delay and obfuscation by Federal agencies as a means of coping with FOIA requests. The amended FOIA provides no fundamental philosophical change, but primarily a set of procedural rules which substantially reduce the use of discretion in withholding information.

One perhaps significant outcome of the FOIA is that government agencies will likely have to act in a more consistent manner across companies within an industry group. For example, the openness of the FDA's records could allow determination of preferential company treatment through a quick scan of the appointment calendars of key officials and the minutes of meetings with companies. OSHA reports could be examined to reveal whether inspection and enforcement practices are uniform within an industry. Although it is unlikely that perfect equity will ever result, more consistent policies should occur.

As the FOIA and Sunshine Act become established, the question arises as to whether government decision making will be forced through scrutiny to come closer to a theoretical norm of rationality with carefully developed alternatives evaluated on the basis of a clearly defined objective function. Although decision outcomes are often visible, the decision processes have remained hidden for the most part. Consequently, the recent legislation, by increasing the openness of the decision-making process, may substantially change the nature of that process.

Summary and Action Implications

In summary, the FOIA provides another useful tool for the compilation of strategic competitive information. The value of the FOIA in tactical situations is likely limited to special circumstances (e.g., the specific item of information and its location are known and a means for its timely retrieval can be arranged). The company relying on the FOIA for government input on a tactical issue will usually be disappointed unless the above conditions can be met.

In the short term, companies which exploit this relatively new and little used source of information may realize some differential competitive advantage. In the longer term, the FOIA may raise the general level of available competitive information. But, perhaps more importantly, the potential for insight that the FOIA provides on patterns of government policy making may result in a useful perspective for a more proactive approach by business to management of the public-private sector interface.

Companies must recognize the defensive as well as the offensive implications of the FOIA. A competitive information opportunity for one company may raise a substantial competitive threat for another.

These three summary points, keying on business policy and government policy, strategy and tactics, and offense and defense, suggest a number of action implications for the manager.

- First, treat reports for submission to government agencies as

sources of potential threats to the security of competitively valuable information. Not only may your company's data become available to a competitor through an FOIA request made by a competitor or some other agent (e.g., a business news reporter or a financial analyst), but it may easily be traceable in a published government report. The anticipatory defensive strategy and tactics discussed earlier are usually a small price to pay in order to avoid a future crisis.

• Second, be constantly aware that other companies are submitting similar reports to government agencies, and government personnel are compiling records on other companies just as they are on yours. How useful could this information be to your company if it could be obtained? Access to records filed by, or on, competitors is generally the easiest to obtain. The type and location of the record tend to be much less difficult to pinpoint, because the company is usually familiar with the agencies its industry deals with on a regular basis. However, it may be that information concerning actual or potential suppliers and end users is of at least equal importance. It tends to be more difficult to successfully access this information, since public-private interface mechanisms outside your industry may be imperfectly understood.

• Third, take steps to become more informed concerning both the types of information and specific information available as a result of the FOIA, the Government in the Sunshine Act, and state sunshine acts. A company's purview of the competitive and government environments may be substantially expanded with a relatively limited investment of time. Private Washington newsletters and daily, weekly, and monthly agency bulletins are useful guides to both policy and, even more important, policy making.

• Fourth, be particularly sensitive to the opportunities to open a window on government policy making. Because policies evolve over time rather than arise spontaneously, scan continuously rather than relying on sporadic attention to major policy pronouncements. In the public sector as well as the private sector, what the entity has actually done in the past is usually a most reliable guide to future policy. Day-to-day operations tend to become policy. This window on government policy making should develop a general awareness as a basis for turning attention toward cues indicating opportunities to influence the government decision-making process.

• Fifth, middle-level working relationships with agency personnel may lead to a mutually beneficial exchange of knowledge with no risk of compromise on either side. Note that middle-level, rather than top-level relationships are stressed here. Administrations come and go, but civil servants remain and bridge the gaps. It is important that these relationships have their basis in the day-to-day operating decisions characteristic of the mid-level in both the public and private sectors. As noted in the fourth point,

the emphasis should be on the development of policy, not on policy pronouncements.

- Sixth, develop an awareness of the mechanics of using the FOIA. Although the amended Act has considerably reduced the bureaucratic difficulties, a little expert assistance such as that provided by the publications of the Project on National Security and Civil Liberties[10] in Washington can be helpful. Some law firms, generally those based in Washington, have had extensive experience with the Act, and sometimes an FOIA service company can be of use. The FOIA Officer in each agency may also be able to help with many of the more mundane, mechanical aspects of a request. As a general rule, it appears to be useful to seek information aggressively and to be as specific as possible in making a request.
- Seventh, such a new tool in the scanning portfolio may have organizational implications. An internal information center, generally located in the office of the internal corporate attorney, should be set up to manage defensive strategy and tactics and to serve as an information resource for using the FOIA offensively. A second organizational implication is appropriate training of company personnel who have any interface with government personnel. Points one, four, and five above clearly indicate that successful exploitation of and defense against the FOIA require sensitive and educated employees.
- Finally, an awareness of the implications of the FOIA may trigger other scanning and interaction opportunities which may enrich the understanding and management of the public-private sector interface.

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Mr. RADER. The second panel for the subcommittee today will respond to several of the points made by our first panel.

We have two of the leading attorneys who have represented requesters of information under the Freedom of Information Act—Nancy Duff Campbell and David Vladeck.

Nancy Duff Campbell is an attorney with the National Women's Law Center where she has had extensive experience with the Freedom of Information Act, particularly representing requesters of information.

She is a former law professor and author of "Reverse Freedom of Information Act Litigation; the Need for Congressional Action," published in the Georgetown Law Review.

She also wrote "The Reverse Freedom of Information Act" chapters for both the 1980 and 1981 editions of litigation under the Federal Freedom of Information Act and Privacy Act.

David Vladeck is an attorney with the Public Citizen Litigation Group. He has also been director of the FOI Clearing House and has had much experience in litigating reverse-FOIA suits.

He was a graduate training fellow at Georgetown University.

We will hear first from Ms. Campbell.

STATEMENT OF NANCY DUFF CAMPBELL, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, D.C.

Ms. CAMPBELL. Thank you.

I would like to introduce Anne Goldstein who is an intern in my office who helped to prepare the testimony that I am going to give today.

I hope that my written testimony will be submitted for the record and would like to speak somewhat more informally to you today.

First, I would like to emphasize that I am speaking from my experience, both as a litigator—as you said in your introduction, primarily for requesters—and from my experience doing research as a law professor on FOIA problems, particularly those posed by the reverse-FOIA suit.

I would like to begin by picking up where you left off on your questions to the panel before us. That is the question of whether there is sufficient evidence of harm or threatened harm to businesses to justify the kind of approach that is embodied in the Dole bill.

NO EVIDENCE OF HARM

I believe that, based on my experience and my research, there is not sufficient evidence to take this kind of an approach, and that this is confirmed by Professor Stevenson's testimony and his much more lengthy draft report for the administrative conference.

In my research, and I have citations for this in my testimony, I determined that of the reported reverse-FOIA cases only one was a case which had been brought by a competitor, in which a business was attempting to enjoin the disclosure of that information to the competitor.

All of the other reported cases or unreported opinions that I was able to obtain at that time were cases in which public interest requesters or private citizens or Government officials—sometimes officials of States or localities—were requesting information and the business interest was attempting to restrain disclosure to those kinds of individuals.

That is not to say that there may not have been some horror stories, although I think that Professor Stevenson's report suggests that there have not been the number of those kinds of incidents that some would like us to believe.

PROBLEMS

On the other hand, there are problems under the FOIA, particularly in the reverse-FOIA context. From my perspective, many of these problems are problems for requesters.

I think you will see a kind of different feeling on the part of this panel than on the previous panel.

In the reverse-FOIA situation, in part because the agencies do not all have procedures and certainly do not have uniform procedures, often the requester gets lost in the shuffle when the agency is attempting to determine what it should do—whether it should give notice, how much notice it should give, and what kind of a record it should prepare.

When the case gets to the courts, the question of the standard of review and other procedural problems have caused difficulties for requesters, as well as submitters.

For these reasons, I think that perhaps some amendment of the act is warranted but that the solutions should be, at least at the outset, or at least at this stage, procedural solutions, and that they can be procedural solutions, that are far simpler than those that are embodied in the Dole proposal.

I think that these solutions need to balance the rights of requesters and submitters to give more rights to submitters than they have now but to provide, first, rights to requesters to participate at the agency level and then to provide for court review that is also fair to both submitters and requesters.

SUGGESTED PROCEDURES

I would like to just run through a briefly of the kinds of procedural protections that I think are needed and to elucidate for you some of the problems that I see with the Dole approach and why I prefer a simpler approach, such as that which is embodied in Representative English's bill on the House side.

NOTICE

One, there should be a provision for notice to submitters similar to the provisions that are now encoded in the Dole bill and the English bill.

I think the Dole bill is also good in that in the process of providing notice to submitters, it provides for notice to requesters that the submitter has been notified, and that a process is beginning to determine, first at the agency level, whether the information should be disclosed or withheld.

On the other hand, I do not think that the bill should provide for notice to every submitter in every instance when there has been information submitted by the submitter in question. Rather, there should be a procedure for the submitter to mark the material as confidential at the time it is submitted and only in those instances should notice be given to the submitter. I say this because I believe there are instances in which submitters do not object to their material being released or do not object to all of their material being released. The notion of providing notice in every case, when it may not be necessary and may simply delay the process, I think is not a wise one.

I think my suggestion that would be a minor modification in the current Dole procedures.

OPPORTUNITY TO CONTEST DISCLOSURE

Second, I believe that there should be some opportunity for the submitter to contest disclosure at the agency level, and that the procedure should be established through a uniform congressional standard if possible, because of the different kinds of procedures we are now seeing at different agencies.

However, I believe that an addition to the Dole bill in this instance that would be welcome would be one in which the requesters were permitted to participate in this agency process.

Submissions would be obtained from the submitters in writing, and then from the requesters in writing, so that an agency record

could be developed. I think this procedure would also resolve many of the problems alluded to by the earlier panel under current law in which there is not very much of a record, or it consists of a letter here and a letter there. There should be a process at the agency level to develop the record.

However, I do not believe that this process need be conducted under any kind of hearing procedure—whether it is an ex parte hearing, as envisioned by the Dole bill, or a more formal administrative law judge type of hearing under the APA.

I think that written submissions are sufficient to provide the kind of record that is necessary for court review. They are the usual kinds of submissions in many kinds of informal agency proceedings, and I do not think there is a different reason for having different procedures in this instance.

TIME PERIODS

The time periods of the act would have to be extended in order to accommodate this kind of process. However, I do not believe that they need to be extended to the extent that the Dole bill extends them.

Under that bill, according to my calculations, it could take over 50 days to determine whether to disclose information if written submissions were provided and over 75 days if there were some kind of an ex parte hearing.

I think that the kind of procedure that I am describing could be accomplished initially at the agency level in approximately 20 days, with 10 days for an appeal, resulting in a total of 30 days—essentially the same standard as is now provided under the act, except that I would reverse the time periods and give 20 days for the initial determination and 10 days for the administrative appeal.

EXHAUSTION OF REMEDIES

One problem that is not addressed in the Dole bill is the question of the exhaustion of administrative remedies. In fact, I would point out to the committee that under the procedures as I read them, it seems to me that the requester will be able to get to court every time before the submitter can get to court, simply because the submitter may need to wait a very long period for exhaustion, whereas the requester in many instances may have a shorter period under the procedures set forth in the bill.

I believe that the exhaustion question should be dealt with in a way that is fair to both submitters and requesters and in a way that does not result in either getting to court first. Rather, once a particular determination is made by the agency, regardless of which party it favors, both should be permitted to go to court for review at the same time, so that you do not have two cases, or three or four cases, going on in different forums.

VENUE

A related problem is the question of venue—in which court should an action be permitted to be filed. Again, the Dole bill

provides for venue for reverse-FOIA cases but does not deal with the venue issue raised when one party, say it is the requester or the submitter, is able to exhaust first and go to one court and the other party goes to a different court. Then what happens when you have two parties litigating essentially the same issue in different forums? In the past, this has occurred in as many as 8 or 10 forums when there are several submitters involved in a case.

I believe that there are a couple of ways that this could be resolved. One would be simply to let the parties go to different courts and try to resolve the issue under the normal procedures under the Federal rules by consolidation of cases, by resort to multidistrict litigation panels, and so forth.

I think a preferred procedure would be that which is encoded in the English bill that would give preference to the forum choice of requesters, as is now true under the FOIA. However, it would permit liberal intervention or joinder in these kinds of cases so that all parties could be together in the same suit, and the litigation could proceed without the duplication problems which now exist.

SCOPE OF REVIEW

On the scope of review—another issue which was discussed earlier—I believe there are strong reasons why the arbitrary and capricious standard of the APA should be the standard for review in the reverse-FOIA situation.

First, if the act is amended to provide procedures so that a record may be developed at the agency level and that all interested parties may participate at the agency level, it seems to me there is no reason to start over in the district court.

Indeed, the reason for de novo review in direct FOIA cases was because of Congress' fear of underdisclosure, or fear that the agencies would not disclose, and the need to have a disinterested Federal judge review the case de novo.

I think we may come to a time when even that de novo review may be eliminated from the act; unfortunately, I do not think we are there yet. But I think there is no basis for a de novo standard if a procedure can be developed at the administrative level to resolve the reverse-FOIA situations fairly.

The administrative review provided under the APA, the arbitrary and capricious standard, is also less time consuming, of course, and less costly. Given what I think is meager evidence of overdisclosure on the part of the agencies, I do not think that de novo review is warranted for submitters' cases.

ATTORNEYS' FEES

Last, the question of attorneys' fees: I think this issue needs to be looked at a little more closely than the Dole provisions have.

I agree with the approach in the bill that there should be an opportunity in some instances for submitters to obtain fees. However, as I read the bill this opportunity is limited, as it is now under current law for requesters, to the situations in which the submitter or the requester is the complainant in an action. This, again, does not take into consideration a situation in which a submitter or a

requester may be an intervenor in an action or may be joined by someone else.

I think the bill should be modified to provide, again, that both submitters and requesters can receive fees but to clarify that they should be able to receive fees regardless of how they got into the case, rather than simply as complainants.

I think, however, that the current legislative history of the act that tends to restrict awards of fees to persons who are using the act for commercial purposes should be maintained.

SUBSTANTIVE CHANGES

Last, I believe that the kind of substantive changes that are provided for in the Dole bill, which I believe will be addressed more specifically by Mr. Vladeck, are unwarranted, as I said at the outset.

I think we should at least try to attempt to modify the procedures and see if that improves some of the problems that have been complained about before we begin to codify the kinds of substantive changes that are provided in this bill.

In my view, these changes would protect virtually all information provided by submitters, regardless of the public interests. I would be happy to respond more in the question time to the kinds of information that I, in particular, am concerned about.

Similarly, I think the provision of the bill that would provide that the Trade Secrets Act is a statute within exemption 3 is not necessary either. If procedural protections were embodied, many of these substantive changes would not be needed—particularly not at this time.

I would like to thank the subcommittee again, and I would be happy to answer any questions.

Mr. RADER. Thank you very much.

[The prepared statement of Ms. Campbell follows:]

Prepared Statement of Nancy Duff Campbell

Mr. Chairman, Members of the Subcommittee, I thank you for the invitation to appear before you today. My name is Nancy Duff Campbell. I am an attorney with the National Women's Law Center, a civil rights organization working to advance and protect women's legal rights. In this capacity, I have represented requesters of information under the Freedom of Information Act in their efforts to obtain data important to the advancement of women's rights, particularly equal employment opportunity data supplied to the government by various federal contractors. In 1978, while a law professor at Georgetown University Law Center, I published a law review article on the FOIA issues that continue to be my particular area of concern, those arising out of reverse Freedom of Information Act lawsuits. I have attached to my prepared testimony a copy of that article, which provides a more detailed explication of some of the points I wish to make today.

As this Subcommittee is aware, the reverse FOIA lawsuit is one in which a private party seeking to prevent the disclosure of information by the government under the Freedom of Information Act sues in federal court to restrain that disclosure. Any such suit clearly affects the rights of individuals seeking to obtain information under the Act, as well as the rights of individuals or institutions who have supplied the information to the government in the first instance. Both parties have significant interests at stake -- the requesters in learning about the activities of their government and the submitters in protecting the

privacy and confidentiality of information they have provided the government, particularly when it involves trade secrets or other data whose release might injure their competitive position.

In my testimony before the Congress four years ago, and again in my law review article one year later, I concluded that the evidence that the interests of submitters had been injured or threatened with injury by impermissible agency disclosure of confidential business information was meager. Rather, to the extent that the reverse FOIA action was available, the threat, as I pointed out, was to the interests of requesters, who had been neglected, first in the agencies' attempts to provide notice and an opportunity to contest disclosure to submitters at the administrative level, and, second, in the ensuing court proceedings that tended to favor the ability of submitters to choose the forum in which a case would be litigated and to obtain a standard of judicial review of agency disclosure determinations that was far more demanding than warranted in the reverse FOIA context. My view then was that although some of the issues raised by reverse FOIA suits could be resolved by agency regulation, and some by the courts, not all of the issues could be so resolved and that, in any event, a Congressional solution was preferable for both submitters and requesters because of the uniform approach such a solution would provide.

In the intervening years, my view that there is little, if any, evidence that the interests of submitters are threatened by impermissible agency disclosures has been strengthened by the inability of others, as well, to document abuses. My initial

conclusion was based on my own experience as a litigator, my informal conversations with others involved in these issues, and my review of the cases which, at that time, revealed only one case in which a reverse FOIA action had been brought to restrain the disclosure of information to a competitor; in all of the other cases the actions were brought to restrain the disclosure of the information to a member of the public or a public interest group.1/ In just the last year a study commissioned by the Administrative Conference of the United States, after a wide search for documentation of disclosure abuses involving confidential business information that included the publication in the Federal Register of a notice requesting submitters and others to come forward with such documentation, found only a "surprisingly small" number of reported abuses and of those determined that many were of "dubious accuracy" or involved disclosures that had no relation to the FOIA. See Stevenson, Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4 (Draft Rep.) 26 (Dec. 15, 1980)("Stevenson Report"). As the author of the study, Professor Russell B. Stevenson, Jr. of George Washington University Law School, concluded, the "perception of the problem" is far greater than the problem, Stevenson Report, at 33; this is hardly the stuff on which to wield an all-out campaign to amend the FOIA.

At the same time that the evidence supporting the cries by

1/ See Campbell, Reverse Freedom of Information Act Litigation: The Need for Congressional Action, 67 Geo. L. Rev. 164, n. 387 (1978).

submitters for changes in the Act has become, if anything, weaker than it was a few years ago, requesters continue to be frustrated in their attempts to obtain information that, because it has been submitted by individuals or institutions outside the government, is subjected to varying procedures among the agencies, see, e.g., 17 C.F.R. §200.80 (Securities and Exchange Commission); 40 C.F.R. §2 (Environmental Protection Agency), and to conflicting treatment in the courts, compare Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977), vacated and remanded sub nom. Chrysler Corp. v. Brown,, 441 U.S. 281 (1979), earlier judgment aff'd in part, vacated in part and remanded, 611 F.2d 439 (3d Cir. 1979), with Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977). Submitters, too, suffer from the varying procedures of agencies and conflicting treatment in the courts. Legislative reform of the Act therefore, though perhaps not as compelling as it seemed four years ago, when fewer reverse FOIA cases had been litigated and fewer agencies had addressed the issues in their regulations, nonetheless may still be warranted to address the issues the courts and the agencies cannot or have not addressed and to provide a uniform approach to the issues.

My focus today will be on the provisions of the Dole-Horton bill, S.1247 and H.R.3928, and on my reasons for prefering the procedural approach of the English bill, H.R. 2021, to the combined procedural-substantive approach of Dole-Horton.

Although some of the procedural changes that would be accomplished by the Dole-Horton bill are welcome ones, on balance the

bill provides more protection to submitters than is warranted. Alternative, less cumbersome procedures such as those embodied in the English bill would better safeguard the rights of both submitters and requesters, and save time and expense. In addition, the substantive changes accomplished by the Dole-Horton bill in the scope of Exemption 4 and in the relationship between the Trade Secrets Act, 18 U.S.C. §1905, and the FOIA, are unnecessary in light of the procedural changes proposed by the bill, and in other respects as well, unwise.

Overview of Dole-Horton Bill

Procedurally, the Dole-Horton bill requires that the agency, after making a threshold determination that the record requested is not "in the public domain," notify the submitter of the record, within 10 working days, that a request has been made, that it is the agency's intent not to withhold the record, and that the submitter has the right to submit written objections to disclosure within 10 working days or to request an "informal ex parte hearing" to contest disclosure within 5 working days. Proposed 5 U.S.C. §552(a)(7)(A)(i). With certain exceptions, and unless the time is extended by the agency "to permit development of the evidence" or for "other exceptional circumstances," the hearing must take place within 30 days, and a final agency decision must be made within 30 days of the conclusion of the hearing. Proposed 5 U.S.C. §552(a)(7)(B)(ii) and (C)(i). The requester is given notice that the records requested are subject to the above procedures, and that the submitter has been notified of the request. Proposed 5 U.S.C. §552(a)(7)(E)(i). The requester

is also given notice if a hearing is to be held, and then is given notice of the final agency decision. Proposed 5 U.S.C. §552(a)(7)(E)(ii), (iii). At no point, however, is the requester allowed any opportunity to present his or her views to the agency as to whether the record should be disclosed. The requester may challenge in court an agency's written finding that exceptional circumstances warrant an extension in the time periods set forth above; in the absence of a written finding, however, the requester must wait 40 days from the initial notice that the record is subject to the act or 60 days from the notice that a hearing will be held, before it can deem the request denied. Proposed 5 U.S.C. §552(a)(7)(G) and (F). The agency's determination to disclose the records is subject to de novo review, in which the burden is on the agency to sustain its action by a preponderance of the evidence. Proposed 5 U.S.C. §552(a)(7)(H)(i). Both submitters and requesters are entitled to an award of attorneys' fees and costs against the United States. Proposed 5 U.S.C. §552(a)(7)(H)(ii).

Substantively, the bill attempts to remedy a perceived problem of over-disclosure by redrawing the business records exemption to include "proprietary information which would not customarily be disclosed to the public" or "information which the agency in good faith has obligated itself not to disclose." Proposed 5 U.S.C.§552(b)(4). In addition, the bill provides that the Trade Secrets Act, 18 U.S.C. §1905, is a statute within Exemption 3 of the FOIA such as to bar the release of records within §1905. Proposed 18 U.S.C. §1905.

Notice Provisions

The provisions of the Dole-Horton bill that guarantee submitters notice of an FOIA request for the records they have submitted to an agency, and notice to the requester that the submitter has been informed of the request for records, are welcome. Notice should be given, however, not to every submitter in every instance, as the bill provides, but rather only to those submitters who have at the time of submission requested notice and an opportunity to contest disclosure. Such a procedure adequately protects submitters who oppose disclosure and saves agency time and money by dispensing with notice to submitters who have no interest in contesting disclosure. It is the procedure provided in the English bill, proposed 5 U.S.C. §552 (a)(4)(A)(ii)(I), and recommended by Professor Stevenson. Stevenson Report, at 57.2/

Provisions for Filing Written Objections

The provisions of the Dole-Horton bill that give submitters an opportunity to contest disclosure by filing written objections are equally laudable. The requester should be given an opportunity to file written responses to the submitter's objections as well, however, as provided in the English bill, proposed 5 U.S.C. §552(a)(4)(A)(ii)(II).

2/ The 1978 report of the House Committee on Government Operations cited such a procedure with approval, although it did not formally recommend any specific notice procedure. See Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits, H. Rep. No. 1382 (95th Cong., 2d Sess.) 31, 34 (1978).

Ex Parte Hearing Provisions

The provisions of the Dole-Horton bill that guarantee, at the submitter's request, an ex parte hearing to contest disclosure are unwarranted. First, submitters can more simply and just as adequately present their arguments against disclosure by following the bill's alternative procedure of filing written objections. Second, an ex parte hearing is time-consuming and expensive in that it requires the services of a hearing officer and the development of a more formal record.3/ Third, an ex parte hearing by definition excludes requesters from participation in the agency's decisionmaking process. A provision for written submissions rather than any ex parte hearing is the procedure recommended by both the House Committee on Government Operations in its 1978 report, H. Rep. No. 1382, at 52, and by the English bill, proposed 5 U.S.C. §552(a)(4)(A)(ii)(II).

Time Limits

A related objection to the Dole-Horton bill is the time period proposed for each stage of the administrative process. As described above, the process of deciding a request for information when the submitter objects to disclosure can take over 50 days when written objections are filed, and over 75 days when an ex parte hearing is requested -- indeed, longer, in both cases,

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3/ Such a hearing may also require more preparation time than is necessary to draft written objections, as the Dole-Horton bill implicitly recognizes in allowing up to 30 days before a hearing must be held, although only 10 days in which to submit written objections.

if extensions of time are granted "to permit development of the evidence" or for "other exceptional circumstances."[4/] These time periods are a substantial and unnecessary expansion of the time deadlines imposed by Congress in the 1974 amendments to the FOIA, which were an attempt to redress the excessive foot-dragging of many agencies in complying with requests.

At the same time, it is evident that an agency cannot complete the process of providing notice, awaiting and analyzing written submissions, and reaching a responsible decision within the FOIA's 10-day deadline for response to a request. I therefore suggest a modest expansion of the time period for initial agency determinations, from the current 10 working days to 20 working days. This extension should apply, however, only in those instances in which a submitter requests, at the time the records are provided to the agency, notice and an opportunity to present its views to the agency prior to disclosure. Because this extension would enable the agency to develop a fuller record initially, with arguments for and against disclosure by both requesters and submitters, the current Act's time limit for a decision on an administrative appeal could be lowered from 20 working days to 10 working days. The overall 30-day limit of the current FOIA would, accordingly, be preserved. Moreover, the suggested changes in the time periods are essentially the same as those provided in the English bill and suggested by Professor Stevenson, Stevenson Report at 87, both of which advocate a 40-

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4/ No time limits are imposed on such extensions.

day limit for agency decisions in reverse FOIA cases.[5/]

Administrative Appeals and Exhaustion of Administrative Remedies

The Dole-Horton bill does not address directly the reverse FOIA procedures to be followed by agencies that currently provide for an administrative appeal of initial FOIA determinations. Both requesters and submitters adversely affected by an initial determination should have the right to an administrative appeal, however. As in the initial agency proceeding, the appeal should consist of written submissions to the agency, and both requesters and submitters should be given notice of the appeal and permitted to participate. If the initial decision is partially adverse to both parties (for example, a decision in favor of partial disclosure), and both the requester and submitter appeal, their respective appeals should be consolidated. Finally -- and this is of paramount importance -- neither the requester nor the submitter should be able to seek judicial review before the other; both should be deemed to have exhausted their administrative remedies when a decision is issued or when the agency fails to reach a decision within the time limits specified in the Act.[6/]

[5/] The House Committee on Government Operations in its 1978 report deferred any recommendation on whether the Act's time periods should be extended. See H. Rep. No. 1382, at 53.

[6/] In this latter respect, the Dole-Horton bill appears to favor the requester's ability to file an FOIA suit before a submitter can file a reverse FOIA suit, by operation of two of its provisions. First, the requester is deemed to have exhausted administrative remedies when certain time limits have passed without an agency decision. The requester can then immediately file an action for judicial review, an option not available to the submitter until an adverse agency decision is forthcoming. (continued)

Venue

The Dole-Horton bill does not address the related issue of the proper venue for resolution of the controversy between the requester and the submitter when the requester files an FOIA action in one forum and the submitter files a reverse FOIA action in another forum. In GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 100 S.Ct. 1194 (1980), the Supreme Court held that an agency's nondisclosure in an FOIA case in one forum, pursuant to a court order in a reverse FOIA case in another forum, was not an "improper" withholding of information under the Act. A Congressional solution to the venue issue should be provided, however, that does not turn on the fortuitous ability of either the requester or the submitter to obtain an order that may bar litigation in the other's forum. See note 6, supra. Congress, in furtherance of the primary purpose of the FOIA to promote the disclosure of information, should continue its preference for the rights of the requester by permitting that party's choice of forum, under the broad venue provisions of the FOIA, to control the location of the litigation. This preference should be afforded in the cases in which the agency's determination is adverse to the requester by limiting the submitter to interven-

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Second, a requester may at any time seek judicial review of an agency decision to extend the time limits provided in the proposed act, at which time the reviewing court may initiate de novo review of the request for disclosure and the related objections of the submitter, all in the forum selected by the requester. In either of these two instances, the requester may succeed in filing the first action in the forum of his or her choice, and, consequently, succeed in precluding litigation of the controversy in other forums by the submitter. Cf. GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 100 S.Ct. 1194 (1980), discussed infra.

tion as of right in the requester's suit as a means of adjudicating the issues. When the agency determination is adverse to the submitter, the requester should be permitted to intervene as of right in the submitter's suit or file a separate suit in a forum which, upon a motion for consolidation, would be preferred over the forum chosen by the submitter. When the agency determination is adverse to both the requester and the submitter, the requester should be afforded a certain number of days within which to file an appeal. If no such suit is filed within the requisite time period, the submitter could file in one forum and the requester would be limited to intervention in that suit in that forum for an adjudication of the issues. In each of these instances notice would be required to be given by the plaintiff to the other party (the requester or the submitter) of any suits filed against the agency. The broad venue provisions of the FOIA could govern the choice of forum for only the requester, with the submitter limited to the more narrow provisions of 28 U.S.C. §1391; or the venue provisions of the FOIA could govern the forum choices for both parties. A variation on this procedure is provided in the English bill, proposed 5 U.S.C. §552(a)(4)(B)(i)-(iv).

Alternatively, although a less desirable solution, Congress could remain neutral, by affording no preference in the choice of forums to the requester. Rather both requester and submitter could be permitted to choose among the forums provided in the current FOIA, but in the event of their filing separate suits consolidation of those suits would be accomplished by the use of conventional notions of convenience to the parties, including

reference to multi-district litigation panels to resolve the problems when necessary. This is, in general, the approach suggested by Professor Stevenson. Stevenson Report, at 106.

Scope of Review

The Dole-Horton bill authorizes de novo review of agency determinations to disclose, to complement the de novo review of agency determinations not to disclose contained in the current Act, 5 U.S.C. §552(4)(b). The standard of judicial review in disclosure cases should, however, be narrower than the standard in nondisclosure cases, and should be limited to a determination, on the agency's own record, of whether an abuse of discretion has occurred.

This limitation of review to the agency record will require a different procedure in reverse FOIA cases than the one that is followed in FOIA cases, but there are sound practical reasons for the distinction. In FOIA cases the requester has not seen the information and thus is unable to present fully the argument for disclosure until the action reaches the courts, where indexing by the agency or the use of sample documents may reveal a need to supplement the record. See Campbell, supra note 1, at 128-129. In reverse FOIA cases, however, the submitter is familiar with the information and should be able, particularly under either the Dole-Horton or alternative agency procedures suggested here, to present the arguments against disclosure at the agency level without requiring further evidentiary proceedings in the district court.

The nature of judicial review itself suggests other reasons

why de novo review should not be employed in reverse FOIA cases. De novo review dictates that a court consider the questions before it as if it were the agency faced with deciding the case in the first instance. Thus, the amount of court time expended is considerably more than that necessary simply to determine from the agency's own record whether the agency has abused its discretion. The granting of relief to either party is delayed, as is the decision of other cases on the court's docket. Although these consequences may be justified in FOIA cases, in which Congress has for substantial reasons provided for de novo review, such consequences are unwarranted in reverse FOIA cases.

De novo review in FOIA suits functions as a check on agencies' observed bias towards secretiveness and nondisclosure. Confronted by evidence of agencies' systematic over-denial of requests for information, Congress concluded that the additional time and expense entailed by de novo review were justified by the FOIA's overriding purpose of disclosure. Submitters have not presented similar evidence to justify de novo review in reverse FOIA cases. Those few instances of agency over-disclosure which have been brought to light indicate that some agencies on some occasions may have been careless; there is no suggestion, however, of the kind of systemic flaw that Congress addressed in 1966. If the problem is one of agency carelessness, then the procedural reforms discussed above, combined with court review under the normal standard for informal agency action under the Administrative Procedure Act, will adequately

protect the rights of submitters without subjecting requesters to the expense and delay involved in de novo review. This standard for informal agency action -- judicial review on the agency's record of whether the agency has abused its discretion or otherwise violated the law -- is the standard of review established in the English bill, proposed 5 U.S.C. §552 (a)(4)(C)(ii), as well as advocated by both the House Committee on Government Operations in its 1978 report, H. Rep. 1382, at 63, and Professor Stevenson, Stevenson Report, at 100.

Attorneys' Fees

The Dole-Horton bill adds to the FOIA a provision that submitters may obtain attorneys' fees and costs against the United States in cases in which they have, as a "complainant," substantially prevailed, paralleling the current FOIA provision on attorneys' fee awards to requesters. Although I have no objection in principle to providing submitters with the ability to obtain fees and costs, so long as such awards are limited, as in the Dole-Horton bill, to assessment against the United States, some clarification is warranted. First, if only "complainants" may be "prevailing parties," the submitter (or requester, under current law) who prevails as a defendant or intervenor in an FOIA (or reverse FOIA) case may not be able to obtain fees and costs. This is a problem because it means that the structure of the lawsuit determines when fees will be awarded. Whether a submitter (requester) brings a reverse FOIA (FOIA) suit or intervenes in a FOIA (reverse FOIA) suit, that submitter (requester) is

making the same arguments, to protect the same statutory rights. In the first instance, however, the court may award reasonable attorney fees; in the second, under both Dole-Horton and the current law it may not. See Campbell, supra note 1, at 192-5, Stevenson Report, at 108. The language of the Dole-Horton bill and the current Act should be changed to resolve this problem by providing that "the court may assess against the United States reasonable attorneys' fees and other litigation costs reasonably incurred in any case brought to compel or restrain the disclosure of information under this Act in which the complainant or a nongovernmental defendant has substantially prevailed." This would permit both requesters and submitters to obtain attorneys' fees and costs in the appropriate case,[7] and would preserve the limitation in the current law that awards be assessed only against the United States.[8] In the first respect, it comports with the recommendation of Professor Stevenson, Stevenson Report, at 108, but goes beyond the provision in the English bill authorizing awards of fees and costs only to prevailing

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[7] The legislative history of this proposed change should, consistent with the legislative history of the Act's current attorneys' fees provision, make clear that a court, in exercising its discretion to award fees and costs, should strive to compensate only those who do not have the financial resources or economic incentives to pursue their remedies under the Act. See S. Rep. No. 854, 93rd Cong., 2d Sess. 1 (1974). See also Campbell, supra, note 1, at 192-95.

[8] Because at least part of the purpose of the current FOIA is to encourage the assertion of legal rights by those unable to pay, see note 7 supra, the financing of the assertion of these rights should be public and not private. Thus, the United States should continue to be the sole party responsible for the payment of costs and fees.

requesters, proposed 5 U.S.C. §552(a)(4)(F); in the second respect, it comports with the provisions of the Dole-Horton and the English bills.

Substantive Changes in Exemptions

Others here today will testify at greater length about the substantive changes in the law embodied in the Dole-Horton bill. I would, however, like to make two brief points. First, to base a decision about disclosure on a submitter's routine practice, as the Dole-Horton bill does, is to elevate reflex over reason. Such an approach, as previously noted by the House Committee on Government Operations, H. Rep. 1382, at 18, would require withholding any information submitted by a corporation that automatically and invariably denies requests for information by members of the public. It would illogically require the disparate treatment in FOIA proceedings of two identical documents -- one submitted by a corporation with such a blanket policy of nondisclosure and one submitted by a corporation with an active public information office -- thereby penalizing the corporation with the more open policy. Id.

Second, to treat as privileged or confidential any record the agency promises not to disclose, as the Dole-Horton bill does, is to allow the exception to swallow the rule. Agencies have no incentive to disclose records. Therefore, as the United States District Court for the District of Columbia recently observed, to accept the contention that "an unwarranted, albeit good faith, assurance of confidentiality may serve as the basis for a finding that the assurance must be honored, lest the

ability of the government to gather future information be impaired ... would create a gap in the FOIA large enough to eviscerate the Act: what submission could not be accompanied by 'assurances' of confidentiality and thereby, be asserted to fall within the scope of 5 U.S.C. §552(b)(4)." Green v. Dept. of Commerce, 489 F. Supp. 977, 980 (D.D.C. 1980).

The functional approach adopted by most of the courts and set forth in National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir., 1974), has proven workable, and is far more sensitive to the institutional realities of both agencies and submitters then is the proposed amendment. I therefore urge that its use not be disturbed by legislative enactment.

Similarly, the provision in the Dole-Horton bill that the Trade Secrets Act, 18 U.S.C. §1905, be deemed a statute within Exemption 3 is unwarranted, for the reasons set forth more fully in Campbell, supra note 1, at 144-55.

Finally, I would like to close with the observation that a recurrent theme, both in these hearings and in the literature on reverse FOIA suits in general, is that the perception of the problem may be the problem: if submitters are growing more reluctant to give information to the government it is due to their fear, and not the fact, of over-disclosure. This perception alone may or may not justify changing the law to give more procedural protection to submitters. As Representative Erlenborn suggested last week, we could, perhaps, all better expend our energies correcting that perception. In any event, and even if the perception is sufficient grounds for providing additional

procedural protections to submitters, it is clearly insufficient to warrant a massive change in the substantive reach of the FOIA, such as those changes in Exemption 4 and in the relationship between the Trade Secrets Act and the FOIA encoded in the Dole-Horton bill, propose.

I thank the Committee again for the invitation to appear here today.*/

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*/ I wish to express my gratitude to Anne Goldstein, a third-year law student at Harvard Law School, for her assistance and advice in the preparation of this statement.

Mr. RADER. Mr. Vladeck, we would advise you that your statement will be made a part of the record. We urge you to make your oral comments very concise.

STATEMENT OF DAVID C. VLADECK, STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. VLADECK. Thank you.

Before turning to the specific comments I have about the substantive provisions of the Dole bill, I would like to just briefly introduce Public Citizen and explain why we are so interested in any proposed amendment to exemption 4.

Public Citizen Litigation Group has long been active in FOIA litigation. We have litigated over 70 FOIA cases, probably more than any other public interest group in the country, including such landmark cases as *FAA* v. *Robertson,* the *GTE Sylvania* case, and *Vaughn* v. *Rosen.*

We have had a long-standing interest in the act and represented journalists and other public interest groups who are anxious to use its substantive provisions to get a sense of how the Government is working and how it is interacting with the corporations it regulates.

I have only two major points to make in addition to the ones I have made in my public statement.

I. EXEMPTION 4 DOES NOT NEED TO BE AMENDED

The first is, as Ms. Campbell has said, there is no evidence to support the assumption that there is a need to amend the substance of exemption 4.

In many respects, this hearing is very reminiscent of hearings that were held 4 years ago before the House Committee on Government Information, which addressed the same issues and which heard the same sorts of testimony about corporate horror stories.

After carefully reviewing a considerable amount of evidence and testimony, they concluded, as did Professor Stevenson, that there was at best meager evidence to support the notion that there was a need for a substantive amendment of exemption 4.

At this juncture, it is also worth noting that most of these horror stories you hear about pose one fundamental question; that is, would the information that allegedly has been disclosed would be exempt under exemption 4?

Universally, the answer is probably yes. What the opponents of the presently drafted exemption 4 really are driving at is that there may well be problems in administration.

I submit that where laws are being enforced by people, there may well be an occasional slipup. One example which comes to mind is the National Highway Transportation Safety Administration. Inadvertent disclosure of documents relating to the Firestone 500 tire was apparently the result of a mistake caused by a secretary within the agency.

The real issue—the issue that this committee should be exploring—is whether there is any evidence that an agency has knowingly disclosed information which falls within the ambit of exemption 4.

Like the House committee and like Professor Stevenson, I am not aware of any documented instance in which that sort of disclosure has taken place.

I would also point out that the act has now been extant for 15 years. Over the course of its history, at best there has been meager evidence that exemption 4, as currently drafted, is inadequate to protect legitimate business interests.

In this vein, the committee ought to recognize that there are very strong incentives on behalf of the agency personnel for not disclosing information under exemption 4.

First and foremost, there is a provision of the criminal code, 18 USC 1905, which makes individual agency employees subject to criminal sanctions if they disclose trade secret information.

Admittedly, there is a dispute about the scope of 1905 and whether it is coextensive with exemption 4. However, by and large, most of the information that is subsumed under exemption 4 is probably covered under 1905. Thus, someone working within the agency runs a terrible risk if they knowingly disclose information which falls within that provision.

The second disincentive is that most agencies now--virtually all I am aware of—as a matter of course consult with submitters prior to disclosing allegedly trade secret information. Most agencies have regulations requiring consultation.

In my written testimony, we do endorse congressional action to simply codify these rules concerning notice to submitters and to make them uniform.

But, as a practical matter, submitters are notified in advance and there is dialog between the agency and the submitter prior to release.

The last point is that courts have not been predisposed to disclose exemption 4 information.

In my written testimony, I briefly canvassed some of the exemption 4 cases that have been reported.

They demonstrate that by and large, when the requester gets to court, the requester loses.

There are several reasons for that, one of which is the gross disparity between the means available to requesters and submitters. Courts are also highly sensitive to claims of trade secret material, as are agencies, and that in some instances they have really bent over backwards to give deference and respect to corporate claims that material is trade secret material.

In this regard, it is now the rule in the District of Columbia Circuit, which is the major site for FOIA litigation, that there are now trials under exemption 4 cases where the submitter is given a full opportunity to intervene or to join in the case and to present evidence in a full-blown trial.

At bottom, the point that I want to stress is that there are seldom going to be instances where the corporation has not been fully informed and has had an opportunity to either file a reverse case or to join in an action brought by the requester to compel disclosure and to have their arguments concerning trade secret status fully aired before a neutral hearing officer.

Unless and until industry comes up with some far more concrete examples than they have, this committee ought to be guided by

Professor Stevenson's report, the work done by the House committee 4 years ago on precisely this issue, and by the other neutral studies that have been conducted which show that there is no evidence to support the claim that there really is a legitimate problem with disclosure of business records.

II. THE PROCEDURAL PROVISIONS OF S. 1247 ARE UNWARRANTED AND CONTRARY TO BASIC STRUCTURE OF THE FOIA

I would like to very briefly address the procedural forms that are incorporated into S. 1247. By and large, we oppose them.

We read S. 1247 as an attempt to stack the deck in some respects in favor of the submitter and against the requester.

For example, under the procedures built into S. 1247, the submitter essentially has a right to two trials—the first is sort of an informal hearing before the agency and the second is a separate de novo trial before a Federal judge.

Why there is a need for such a dual procedure escapes me. It seems to me that giving submitters an opportunity to make their cases before the agency and have that decision ultimately reviewed under an arbitrary and capricious standard is far more than adequate protection.

Worst of all, one provision of the bill as drafted raises serious legal questions. That is the need to conduct agency hearings ex parte. Ex parte hearings have long been the bane of our judicial system. They are alien to our entire system of jurisprudence.

It is surprising to me that the proposal now incorporates an ex parte hearing. At the very least the requester should be notified of the hearing and given an opportunity to participate.

The final point that I would like to make is that the committee should be sensitive as to how corporate information winds up in Government files.

Corporations do not submit information to the Government because they are trying to be nice. Information is submitted because corporations are trying to influence the course of governmental conduct.

It seems to me that given that premise, the public ought to know how a Government is interacting with corporations that it regulates.

Thank you.

[The prepared statement of Mr. Vladeck follows:]

Prepared Statement of David C. Vladeck

Mr. Chairman, Members of the Subcommittee:

Thank you for the invitation to appear before the subcommittee this morning to address what have been asserted to be the many problems presented by the trade secret exemption of the Freedom of Information Act and the so-called reverse litigation which has resulted from it. We are pleased that the subcommittee is undertaking these hearings with a view towards exploring what legislative changes might be appropriate for resolving these problems and eliminating uncertainties which exist under the present law.

Prior to turning to the specific proposals pending before the Subcommittee, however, I think it would be useful to spend a minute tracing the origins of the Freedom of Information Act. The concept of freedom of information is by no means new in this country. Indeed it is fundamental to our democratic society. For example, in 1822 James Madison wrote that:

> A popular Government without proper information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives. [1]

Over the years, however, public knowledge of what government is doing has proved to be an elusive goal. When Congress

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[1] Letter from James Madison to W.T. Barry, Aug. 4, 1822, in The Complete Madison 337 (Padover ed. 1953).

passed the Administrative Procedure Act is 1946, it included a "public information" provision to ensure public access to data on the workings of government. Unfortunately, the APA left the bureaucracy with too much discretion, and requests for information were routinely denied on the ground that withholding was "in the public interest." As the House Subcommittee on Government Information and Individual Rights put it in 1966, "the law which was designed to provide public information about Government activities has become the Government's major shield of secrecy." [2] To overcome this problem, Congress passed the Freedom of Information Act 15 years ago -- on July 4, 1966.

Unfortunately, the 1966 Act did not go far enough to pierce the veil of government secrecy, and Congress strengthened the law the in 1974 in two major respects: substantively, by reducing the agency's ability to say "no" to requests for documents, and procedurally, by streamlining the Act so that it could be more easily and effectively used by individuals. Significantly, there was no hue and cry in 1974 to overhaul exemption 4, and it was not amended at that time. More recently, only four years ago, the House Subcommittee on Government Information and Individual Rights considered the same issues now before this Subcommittee, held lengthly hearings, and issued a detailed report, concluding that the Act, as currently drafted, provided adequate protection for business records.[3] Against this backdrop of close Congressional scrutiny of the business records exemption and the judgment that it affords corporate submitters adequate protection for genuinely sensitive business information, this Subcommittee ought to be extremely wary of the charges that have been levied that exemption 4 needs revising.

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[2] H.R. Rep. No 1497, 89th Cong., 2d Sess. 12 (1966).

[3] Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits, H.R. Rep. No. 1382, 95th Cong., 2d Sess. (1978).

These hearings come at a particularly critical time. The Freedom of Information Act is under serious attack from many quarters, and pending before Congress are numerous bills which, if enacted, will cripple the Act's effectiveness. One of the least justifiable assaults on the Act comes from the business community, which is seeking a blanket exemption from public access to government-held business records. If these proposals are enacted, the public will be prevented from learning about what corporations are telling the agencies which regulate them or which award them public contracts, licenses, and other benefits.

I. EXEMPTION 4 SHOULD NOT BE AMENDED

I think that before considering any of the specific proposals, it would be helpful to demystify the notion of "trade secrets." As you know, exemption 4, as presently drafted, protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In many cases, claims of "trade secrets" have been nothing but camoflage for information, if made publicly available, would embarass the submitting company. For example, recently two drug companies strenuously resisted disclosure of data which showed that the companies began testing experimental drugs in humans before needed animal tests had been completed. The animal tests showed that the drugs were carcinogenic. Although the drugs could of course never been marketed, the companies hid behind the of the trade secret exemption until it became clear they could not prevail in court. Similarly, a corporate polluter once claimed that the amount of sulphuric acid it was dumping in the Savannah River was a trade secret because that information would let its competitors know how large its operations were. In other cases, the claims border on the frivilous, such as one company which once claimed that the number of xerox machines it had was a trade secret.

While the corporate community has often sought to use exemption 4 as a shield to protect plainly non-exempt data, all of the neutral studies and inquiries into the adequacy of exemption 4 to protect business records have concluded that despite corporate claims the exemption is more than adequate to protect legitimate trade secret data. Most recently, Professor Russell Stevenson, George Washington Law School, conducted a study for the Administrative Conference of the United States entitled "Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4." Professor Stevenson exhaustively studied the perceived problem of inadequate protection for business records, interviewed a number of corporate officials, and even published a notice in the Federal Register seeking information about instances in which a business had suffered competitive harm as a result of the release of information under the Act. Despite the lengths Professor Stevenson travelled to obtain evidence which would support the assertion that business records are not adequately protected under the Act, this Subcommittee should know that Professor Stevenson concluded that the "problem" was one of perception -- not of verifiable fact. Indeed, like the House Subcommittee on Government Information and Individuals Rights which studied the problem less than four years ago, Professor Stevenson concluded that there was no demonstrable need to amend the substantive provisions of exemption 4.

My experience as a litigator with substantial experience in exemption 4 cases fully bears out Professor Stevenson's findings. To begin with, there are whole categories of cases which demonstrate that if anything exemption 4 is overbroad. For example, in the last four years, my law firm has handled at least five FOIA cases concerning access to information provided to the Food and Drug Administration by corporations seeking to obtain marketing approval for

drugs or medical devices. Although in each of these cases, vocal claims of trade secret status forced us to go to court, each of the corporate defendants ultimately abandoned their trade secret claims prior to an adjudication on the merits. See Webb v. HHS, Civ. No. 81-159 (D.D.C. June 12, 1981); Johnson v.HEW, Civ. No. 77-2013 (D.D.C. July 17, 1980); Brown v. HEW, Civ. No. 80-704 (D.D.C. July 7, 1980); Wolfe v. HEW, Civ. No.79-349 (D.D.C. Oct. 19, 1979); Health Research Group v. HEW, Civ. No. 76-2286 (D.D.C. Feb. 24, 1977).

Similarly, I spent three years litigating a case involving what are called "boycott compliance reports," which are forms submitted to the Department of Commerce indicating whether U.S. corporations were cooperating with the Arab boycott of Isreal. Even though the plaintiff had offerred to forego access to any report for which the submitter lodged a plausible objection to disclosure, the Department of Commerce fought against disclosure for over three years. Ultimately, after having lost before both the district court and the court of appeals, the Department acceded to the procedures we suggested initially, with the result that far fewer than one hundred out of the literally thousands of corporations whose reports were at issue objected to disclosure. See Green v. Department of Commerce, 468 F. Supp. 691 (D.D.C. 1979); appeal dismissed, 618 F.2d 836 (D.C. Cir. 1980), on remand, 489 F. Supp. 977 (D.D.C. 1981). Other cases in which our office had to litigate plainly insubstantial exemption 4 claims include:

-- inspection reports from the Agriculture Department on the wholesomeness of meat;

-- records showing that a utility company had misled its ratepayers in claiming that a nuclear power plant would be less expensive than a coal-fired one;

-- FAA inspection reports on airline compliance with safety regulations;

-- an NRC nuclear plant safety rating report which found that ten of the fifty plants surveyed were in the "below average" category.

While this list is by no means exhaustive, it is intended to demonstrate to the Committee that government agencies are still withholding a great deal of data from the public on what is at best an attenuated exemption 4 defense. The zeal with which agencies protect business information stems from several factors, discussed more fully below, not the least of which is the fact that 18 U.S.C. § 1905 -- a provision of the criminal code -- makes it unlawful to release trade secret data. Also important is the often overlooked fact that there remains a bureaucratic predisposition to withhold information if there is a doubt about its exempt status -- particularly in exemption 4 cases. It also bears noting that requesters have an uphill battle in the courts. It has been our experience that courts are by and large extremely sensitive to corporate claims of competitive harm. Indeed, a brief summary of the cases which have afforded protection under exemption 4 shows that the courts have remained faithful to Congress' judgment that genuinely sensitive commercial information ought not be disclosed. The cases have protected: data revealing assets, profits, losses, and market shares [see,e.g., National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), subsequent opinion, 547 F.2d 673 (D.C. Cir. 1976); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974)]; detailed reports concerning natural gas reserve data and intrastate sales information, including name of purchasers, dates and locations of sales, sales volume and price terms [see, e.g., Continental Oil Co. v.FPC, 519 F.2d 31 (5th Cir. 1975);

Union Oil Co. of California v. FPC, 542 F.2d 1036 (9th Cir. 1976); data describing a company's workforce from which competitors could deduce labor costs, profits margins, competitive vulnerability and predict product and process changes [see, e.g., Westinghouse Electric Corp. v. Schlesinger, 392 F.Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977)]; and information relating to government contracts [see, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979); Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir. 1978)]. As these cases demonstrate, courts have adhered strictly to the concept that confidential commercial records should be protected.[4]

Courts have also grafted procedures onto exemption 4 litigation which make it far easier for a corporate submitter to prevail in court. Most importantly, it is by now settled law that exemption 4 cases must be tried -- no longer may they be resolved on summary judgment where there is an assertion of potential corporate harm. Given the gross disparity between the requester's means and that of the corporate submitter, it is scarcely surprising that the corporate parties are winning the great bulk of exemption 4 cases in the courts.

Thus, in light of the absence of objective support for the notion that corporate data is subject to inappropriate disclosure in either the agencies or in the courts, we see no need for this subcommittee to act to further expand the scope of exemption 4. To the contrary, if anything, the

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[4] While cases finding exemption 4 applicable are legion, it bears noting that few courts have rejected exemption 4 claims. In addition to the cases described in the text above, there are only a handful of decisions rejecting an exemption 4 defenses, most of which concern internal government witness statements, which would more properly be protected under exemption 5 in any event. E.g., Brockway v. Department of Air Force, 518 F.2d 1184, 1188 (8th Cir. 1975); Rabbitt v. Department of the Air Force, 383 F. Supp. 1065, 1068 (S.D.N.Y. 1974).

the Subcommittee should be moving towards refining the exemption to ensure that its disclosure prohibitions are tightened up.

Unfortunately, S. 1247 moves in the opposite direction. It seeks to greatly expand the coverage of the exemption to include "proprietary information which would not customarily be disclosed to the public" by the submitter and information which the agency has obtained "in reliance on a commitment made by the agency in good faith not to disclose such information." These proposals would seriously eviscerate exemption 4 and would exempt virtually all information concerning waste, fraud, wrongdoing and abuse. For example, a government contractor could shield information on cost overruns, fraud, waste of the taxpayers' money, or failure to live up to equal employment opportunity guidelines, because such data "would not customarily be disclosed to the public." Similarly, a company could refuse to turn over any information voluntarily to an agency unless it promises to keep it secret, and the agency official who needs the data will find it simpler to promise secrecy than to negotiate. This is so because most agency personnel have little interest in ensuring that data submitted to the agency be available to the public under the Act, especially where its disclosure might adversely affect the performance of their duties.

What makes this type of proposal particularly brazen is that it would increase the cozy, closed-door government-business dealings which were the very sort of practices the Act was designed to root out. The proposal would result in the supression of documents relating to the administration of defense contracts, GSA supply purchases, the food stamp program, and Deparment of Labor training grants. All of this information would be kept from public view. Yet as I have noted above, there are already adequate safeguards built into the Act to protect disclosure of genuinely confidential information. The House Subcommittee on Government Information reached this conclusion in its 1978 report on the workings of

exemption 4, and a recent report prepared for the Administrative Conference of the United States agreed. The simple fact is that there is no need for this type of broad new exemption.

Not only is there absolutely no credible evidence that federal agencies are knowingly disclosing confidential business information, but the Trade Secret Act, 18 U.S.C. § 1905, makes it a criminal offense for government personnel to disclose "trade secrets." This is a powerful deterrent, since it runs against the individuals responsible for making the withholding determination. In addition, virtually all agencies voluntarily give notice to corporate submitters when allegedly confidential records have been requested by an outsider, and they also provide a mechanism for companies to claim confidential treatment when submitting records to the agency.

Moreover, corporations have hardly been reluctant about running into court to file reverse-FOIA lawsuits if they think that business records they want to protect will be disclosed. And, after the Supreme Court's decisions in Chrysler v. Brown, 441 U.S. 281 (1979) and GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980), the procedures corporations must follow to oppose disclosure of information are now relatively clear. Thus, although I support some of the proposed procedural reforms aimed at accomodating reverse litigation, there is simply no evidence to suggest that the sort of broad-scale overhaul of exemption 4 which has been proposed is necessary to protect any legitimate commerical interest. On the contrary, the facts suggest that what is really at stake is public access to data which corporations seek to hide for what are at their core public relations reasons.

In this context, it is important to note that not all records submitted by a corporation to a federal agency are "private" or "trade secrets," and the D.C. Circuit has set down a useful test for determining what should and should not be disclosed. Simply stated, the Court has ruled that commercial or financial information is confidential if disclosure is likely to have one of the two following effects: (1) disclosure would "impair the government's ability to obtain the necesssary information in the future," or (2) disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir.1974).

If you listen to some in the business community, you might get the impression that corporations hand over their records to agencies because they are civic-minded, good-government boosters. That is not the case, and, indeed, is a far cry from reality. Corporations hand over data to persuade an agency to act in a certain way: to end an enforcement proceeding; to approve a merger; to adopt certain regulatory standards; to seem forthcoming lest the agency subpoena the records in question; to show that the company is in compliance with certain standards; or to obtain a licence or other benefit. If a company does submit such records, if the agency reviews them and takes action and then holds those documents in its files, such records should remain available to the public under the Act to the extent they are not genuinely exempt under the present exemptions. It would be a fundamental abridgement of the public's right to know if this Congress were to amend the FOIA on the basis of flimsy "misperceptions" of the scope of the exemption and without a solid factual basis that a change in the exemption is warranted.

II. THE PROPOSED AMENDMENTS ADVOCATED IN S. 1247 WOULD DO VIOLENCE TO THE FOIA.

While we strenuously oppose any restrictive revision to the substantive provisions of exemption 4, we recognize that certain procedural reforms in the area of "reverse-FOIA" lawsuits would be salutary. No one doubts that there are problem under the current system. For example, as the law now stands, a submitter who wants to block the release of data can file a lawsuit in California or Alaska to prevent an agency from disclosing records to a requester in Washington, D.C. The Supreme Court indicated last year that the only way a requester can protect his or her rights is by intervening in that action, no matter how distant or inconvenient the forum. GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375 (1980). One way to make the choice of venue question fairer to the requester, and thereby promote the FOIA's goal of disclosure -- is by letting the requester intervene in the "reverse" FOIA action and move to transfer the action to a forum where the suit could have been filed by the requester under the FOIA, see 5 U.S.C. § 552(a)(4)(B), or a forum where the suit can be most conveniently litigated for all of the parties. It is of course useful in such controversies for all interested parties -- requester, submitter, and the agency -- to be involved in one proceeding instead of several.

Nor do we object to making it clear that certain of the procedural safeguards employed under in FOIA cases are available in reverse cases as well. Thus, we certainly would not oppose an amendment to clarify that courts have the power to review documents in camera in reverse cases. We also do not oppose a statutory revision codifying what is already the typical agency practice of notifying submitters when their documents are the subject of a request. In this regard, we see no problem with submitters tagging documents "confidential" when they are submitted, and making written

arguments to the agency in opposition to any proposed release of the submitters' records. Indeed, we support Representative English's bill which is presently pending before the House Subcommittee on Government Information and Individual Rights.

While we support these reforms, we vigorously oppose the provisions of S. 1247, which stack the odds in favor of the corporate submitter and against the requester. To begin with, the proposed amendment would automatically require the agency to notify the submitter of a request and give the submitter rights to respond and thereby delay disclosure, even when the information must, under law, be publicly available. Clearly, that provision has either been not well thought out, or has been included only to ensure that the submitter can delay public disclosure.

Second, the proposal would allow the submitter to have an informal ex parte hearing before the agency prior to disclosure. This provision is objectionable on two grounds. First, there is no reason why this sort of hearing should be ex parte. Courts and hearing examiners have historically heard objections to disclosure of allegedly trade secret material on the public record; hearing corporate claims that data ought to be kept secret behind closed doors harkens back to the Star Chamber proceedings alien to our entire jurisprudence. Indeed, even in national security cases where far more is at stake than in most exemption 4 cases, courts have been extremely reluctant to hear evidence ex parte. See, e.g., Military Audit Project v. Bush, 418 F. Supp. 876, 878 (D.D.C. 1976). Moreover, the proposal makes it extremely difficult for an agency to dispense with a hearing by requiring it to determine that the request for a hearing is "clearly frivolous." The only reason to impose such a rigorous standard on the agency is to ensure that hearings are always held,

which will no doubt encourage the proliferation of these hearings. And, we should point out, it will increase the agency's costs if it wishes to disclose, thereby tilting the balance further in favor of withholding and "creating" new justifications for the claim that the administration of the FOIA is too expensive.

Third, the proposal fails to come to grips with the venue problems now experienced in reverse-FOIA litigation. In fact, it exacerbates them by affording the submitter an extremely broad choice of venue. Under this proposal, a submitter and a requester who are notified the same day that the agency has determined to release some, but not all, of the requested records, could file suit in two different district courts. In this respect, the proposal seriously undercuts the venue provisions originally incorporated into the Act, which were designed to assist the requester, who typically lacks the financial resources of the submitter.

Fourth, by incorporating a de novo standard of review in judicial actions challenging agency decisions to release documents, the proposal stands standard rules of administrative law on their head, and further tips the scales in favor of the corporate submitter. It is well-settled law that agency decisions -- particularly after the sort of hearings called for in the proposal -- should be accorded substantial deference. Here, rather than giving weight to the decision of the agency hearing officer or decision-maker, reached after an ex parte hearing, the proposal gives the corporate submitter what is, in essence, two bites at the apple. Corporations would now have a second full-scale opportunity to fine-tune their arguments before a district judge, who would be bound to ignore the agency's ruling. Requesters, on the other hand, are barred from participating in the agency's hearing held at the behest of the corporate submitter, and have no rights whatsoever to initiate a hearing.

Lastly, the net effect of all of these procedures is to ensure that whatever information manages to trickle down through them is at best stale. Layer upon layer of delay is built into the proposal. While the proposal plays lip service to this problem by including a provision allowing the requester to challenge what appear to be unwarranted extensions of time, the protections afforded by this provision are, in practical terms, illusory. The District of Columbia Circuit Court of Appeals has already ruled that agencies may justify failing to adhere to the time provisions spelled out in the Act simply by establishing that they are using good faith efforts to process requests. Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). Given the administrative problems agencies presently face simply in processing requests, there is every reason to believe that saddling agencies with the myriad procedural requirements contained in the proposal will grind most agencies to a virtual standstill.

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As I noted in the opening of my testimony, these hearings come at a critical time. In May, the Attorney General signaled that the Justice Department will once again be willing to go to court to litigate FOIA cases, even where the agency cannot point to a demonstrable harm which would flow from disclosure. The proposal pending before this Committee, which, if enacted, would build a brick wall between the public and all government records concerning corporate interaction with government, is another step in the wrong direction. We therefore urge the committee to take a hard look at the evidence -- evidence which unequivocally demonstrates that exemption 4 as presently drafted fully protects the legitimate rights of corporate submitters.

Thank you.

Senator THURMOND [acting chairman]. Considering your knowledge of agency practices, would you favor the giving of notice of disclosure to the real party in interest, in addition to the one who might have supplied the documents to the agency? Are there circumstances under which you would prefer that no notice be given to the submitter before disclosure of its private data occurrence?

Mr. VLADECK. I think that notice, as a general rule, ought to be given to the submitter. I think there are categories of cases where notice is not necessary. For example, where the data at issue is required to be disclosed as a matter of law.

There are other instances as well. By and large, we do support the notion that submitters ought to be notified.

Senator THURMOND. How often do your organizations bring lawsuits seeking disclosure outside of Washington? Would you object if a submitter who was residing in Utah or Kansas wanted to sue in his own home district to restrain the regional office of some Federal agency from disclosing his private information?

Ms. CAMPBELL. Many of our cases are in Washington.

I think that the concern we have and the reason we advocate a preference as under current law for the forum of the requester really is the result of the kinds of clients that we represent—people of limited resources who would have difficulty participating in a case if it were outside of the area where they live or where their counsel have offices.

On the other hand, these are problems that are common in many kinds of litigation in the Federal courts. As I suggested in my testimony, one possibility is simply to resolve them as they are resolved in other instances, which is to permit the court to determine which is the appropriate forum and who would be most harmed or prejudiced by a transfer of venue in a particular case.

Senator THURMOND. Ms. Campbell, you have opposed de novo review in the past when submitters have asked for it on grounds that the agency's record is sufficient for review. Yet you also support faster handling of the submitter's claim and less time for considering his confidentiality arguments which would reduce the agency's record. Can you explain this?

Ms. CAMPBELL. I think that there are two problems. One is what happens if we do not amend the law? The second is what would happen in the best of all possible worlds if we could amend the law?

I think that the problem right now, without amendment of the law, is one in which different agencies take different amounts of time. They essentially do not follow the time periods set forth in the act. I think too much time is given to developing the record in some cases and not enough time in other cases.

Therefore, I have advocated a procedure under which the time period would be extended from that in the current law but not extended as far as some have proposed. Again, I think that 30 days, approximately, is a reasonable time. I would note that that is the time period generally advocated by the Stevenson report. I think he advocates 40 days, whereas I advocate 30 days. I do not think that is a distinction with a difference.

I think the problem occurs when you get into these 90-day time periods. Whether it is 30 or 40 days, that is an adequate time to develop the record.

Senator THURMOND. Mr. Vladeck, your health research group has been a prodigious user of the Freedom of Information Act. Can you estimate how many FOIA requests you have made in the last year?

Mr. VLADECK. I believe that the health research group has made approximately 300 FOIA requests to the Food and Drug Administration alone in the last year. That is the agency with which it principally deals.

Senator THURMOND. How many of these were granted in full or in part?

Mr. VLADECK. I would be delighted to supplement the record with a letter. I do not know offhand.

I know, however, that the bulk of them are granted in full. A significant percentage, perhaps roughly 10 percent are denied either in full or in part.

Senator THURMOND. Do you know how much money and agency fees were waived by the agencies in response to your request for fee waivers?

Mr. VLADECK. I do not believe the agency informs you of how much money is being waived when they grant a fee waiver. They simply tell you that your fees will be waived.

I cannot even estimate that.

Senator THURMOND. Could you get that up and furnish it for the record?

Mr. VLADECK. I would be delighted to.

[Material to be supplied follows:]

I have been informed by senior members of FDA's FOIA staff that an estimated $4,600 in reproduction costs were waived during 1980. An estimated additional $5,000 in reproduction costs were waived during the first seven months of 1981.

Senator THURMOND. Could you describe a scenario in which information of vital public interest would be withheld under the S. 1247 standards which would be available for lease under the current competitive harm test?

Mr. VLADECK. Yes, sir; I can. For example, let us stick with the FDA if you do not mind.

We recently litigated a lawsuit involving access to test data submitted in support of new drug applications—in this case, investigation of new drug applications—concerning drugs that were still in the experimental stage.

The data that we compelled disclosure of evidenced that the drug companies involved had begun testing these drugs on humans prior to completing animal studies.

These animal studies ultimitely showed that the drugs were carcinogenic.

The drug would never be marketed. Hence, the manufacturers do not have a strong claim under the National Parks test that the material we sought access to was exempt. After all, there would be no competition.

We believe that this kind of data—data showing that drug companies were unfortunately, and perhaps needlessly, exposing human subjects to drugs that had not been adequately tested first

on animals—is of vital and legitimate public concern and raises very serious questions about the methodology employed in testing drugs.

Without the Freedom of Information Act, this information would never have come to public light and certainly would never come to light if the provisions of S. 1247 are adopted.

Senator THURMOND. Mr. Vladeck, we understand that the health research group conducts a subscription service for $280 per year for lawyers who are suing manufacturers of certain medical device products.

Does the group charge subscribers for documents which it obtains for free under the fee-waiver provisions of the Freedom of Information Act?

Mr. VLADECK. No. The only costs that are charged to the subscribers are Xeroxing costs—just our costs of reproduction.

Senator THURMOND. Mr. Braverman posed an example of where disclosed information has no competitive value because it is a new invention and not yet marketed. How would you address this inadequacy in the National Parks standard?

Mr. VLADECK. My first question to Mr. Braverman would be how that information ended up in Government files.

You do not file that sort of information with the Government until you are ready to seek either marketing approval or testing approval from the Government. That sort of information has historically been protected under the common law trade secret laws.

Unless and until it has some potential commercial value, it would not end up in the files of the Federal Government.

Senator THURMOND. Senator Grassley, do you have any questions of any of these witnesses?

Senator GRASSLEY. I do not. I am sorry but I got here late, and I am not prepared to ask questions at this time.

If I have any, I will have to submit them in writing.

Senator THURMOND. We will give you a chance to ask them if you want to.

Senator GRASSLEY. Thank you very much, Mr. Chairman.

Senator THURMOND. Is there anything else either of you wish to say?

[No response.]

Thank you for your appearance.

Senator THURMOND. Our final panel today will represent many of the businesses and nonprofit institutions affected by FOIA's exemption 4.

Will you gentlemen please identify yourselves and tell us who you represent?

Mr. KEYES. My name is Joseph Keyes. I am the staff counsel to the Association of American Medical Colleges. I am accompanying Dr. Stuart Bondurant who is presenting the statement.

Dr. BONDURANT. I am Dr. Stuart Bondurant, dean of the University of North Carolina, School of Medicine. I am presenting a statement on behalf of the Association of American Medical Colleges.

Mr. VIRDEN. I am Prospere Virden. I am senior counsel at Honeywell, and I am presenting a statement on their behalf.

Mr. WHALE. I am Arthur R. Whale, general patent counsel and assistant secretary for Eli Lilly & Co., for whom I am presenting a statement.

Senator THURMOND. I believe the first witness on the panel is Mr. Whale, assistant secretary and general patent counsel for Eli Lilly & Co. since 1975.

Mr. Whale is a past president of the American Patent Law Association, past chairman of the National Council of Patent Law Associations, and past president of National Inventors Hall of Fame Foundation.

Mr. Whale, you may proceed.

STATEMENT OF ARTHUR R. WHALE, GENERAL PATENT COUNSEL AND ASSISTANT SECRETARY, ELI LILLY & CO., INDIANAPOLIS, IND.

Mr. WHALE. Thank you, Senator Thurmond.

Our main business is the high technology, research-intensive development of new drugs, electronic systems for hospital uses, agricultural products—mostly of a chemical nature—and cosmetics.

In complying with the various Federal regulatory procedures, we deliver information consisting of trade secrets to the Food and Drug Administration, the EPA, and to a number of other agencies—to agencies implementing a number of Federal statutes.

In fact, some of these agencies implement a number of Federal statutes which result in a variety of rules and regulations and procedures and philosophies with which we must contend in dealing with the Freedom of Information Act.

We give a large number of different types of information to the various Federal agencies, as you can imagine, because we are indeed a highly regulated industry.

Of perhaps most concern is the information of a process nature which we provide to FDA, EPA, OSHA, and to other agencies.

Taken together, this information reflects the techniques that have been developed in-house, the raw materials with which we work, the processes which we have evolved, the particular temperatures, pressures, research conditions, and purification procedures that combine to make our products ready for the regulatory agencies to approve.

We are very concerned at possible losses of information like this. We are constantly faced with demands, and properly so, for information concerning the effluents from our stacks and from our point-source discharges and the nature and disposition of hazardous wastes with which we must contend. But we are also concerned with what happens to this information in the hands of the Government agencies, because much of it can be reverse engineered to learn exactly what processes we use—for example, what solvents we might have found most suitable to give us the best process economics.

This information all comes from our research and development programs which in 1980 cost in excess of $200 million.

TRADE SECRETS ARE A NEEDED ADJUNCT TO PATENTING

The new products from our research and development programs tend to be sufficiently different from what is old to be patentable.

Indeed, this is necessarily so because recent industry statistics, for example, show the cost of the development of new drug entities to be $50 to $70 million and to consume from 7 to 10 years from development to ultimate marketing.

But the new products from our program must compete on the basis of cost, as well as effectiveness. Since costs are tied to processes, process patent protection is of interest to us, so we pursue patent protection on our processes as well as our products. However, patent protection on processes is uncertain at best, because process patents are relatively easy to invent around.

Also, both product and process patents are subject to varying interpretations under the patent statutes among our 11 judicial circuits. Their validity is often impaired by the disclosure of literature that escapted the attention of the inventor and the Patent Office. In fact, the technical literature in our field is more than doubling every 10 years.

So trade secrets remain an essential part of our competitive strength.

Where the information we provide to an agency is confidential, we tell them so; but there are problems. Not only do we deal with several agencies operating under several statutes having different rules and regulations and policies and philosophies, but all the information we deliver is subject to the Freedom of Information Act. Under FOIA, it is the agency that makes the final determination of the entitlement of our information to trade secret status.

We believe that each bit of it which we identify as truly confidential should be entitled to trade secret status under the Freedom of Information Act. The trouble is that, having determined that the information is indeed entitled to trade secret status under exemption 4 of FOIA, it follows from the *Chrysler* decision that this only means that the agency may withhold the information from requesters. It does not require that they must withhold it.

I am not here to complain about our regulatory agencies. Our experience, in fact, has been that in general they are very sympathetic to the importance of trade secrets. But FOIA lays a heavy hand on our trade secrets.

FOIA BIAS AGAINST TRADE SECRETS

The notable bias in FOIA against the rights of the submitter, as we have learned today, both substantive and procedural, makes it most difficult for us to rely with any dependability on the sanctity of our trade secrets, once they are delivered to the Government.

Also, of course, the motivation of the Government, once they adopt the position that information is a trade secret, to defend its position and to protect our trade secrets, inevitably stems from a different level of concern than ours.

We believe that access to information through FOIA should be limited to the purposes for which FOIA was enacted—namely, the assessment and the monitoring of the operations of Government. However, this is not the case.

You have heard, and it is in your record, for example, that over 85 percent of the FOIA requests made of FDA originate with services who make blind requests for parties wishing to remain anonymous, with companies interested in obtaining information about other companies, and from private law firms who seek information on behalf of unnamed clients.

As a matter of fact, only 3 percent of the FDA requests in 1979 originated with identified public interest groups and with members of the press. The cost of administering all this to the Government was estimated at $47.8 million in 1979 and over $57 million in 1980, an increase of more than 20 percent.

This does not include the cost to industry of trying to protect against improvident disclosure or the value of trade secrets that are lost for no reasons affecting a public interest.

Because of the secrecy that surrounds many requests and the identification of the requesters, I am handicapped in not being able to satisfy Ms. Campbell and Mr. Vladeck concerning the name, rank, and serial number for each trade secret that we have lost. We simply do not know. We do not know where they go; we do not always know that they go anywhere. We do know that some have been lost, and we know that the potential is there, and that the potential is potentially devastating.

We know also that mistakes are made, as Mr. Pulley described.

We also know that some of our information concerning products—the animal data, toxicological data, and so forth—ends up in the hands of foreign competitors, and that it is used to gain registrations in foreign companies to market products in competition with ours.

COLLATERAL USES OF FOIA

Maybe it is of interest to you to know how we use FOIA. We use it to get copies of an agency's record of a meeting with us to see how it accords with our own. The record is available to other people, and we want to make sure we know what they can learn.

We use it to learn the results of an onsite inspection about which we are not otherwise very deeply informed.

We use it to learn of third-party reports on our products to FDA which may not reach us until there is accumulation to a disturbing level.

We use it to check on imminent infringement, because we can determine what facilities have been subjected to inspection for approval for manufacturing drug products and what products have been submitted for regulatory approval.

We use it to learn what other requesters are getting when we are able to spot a request for our information. Sometimes we use it to learn whether the releasing agency, with respect to particularly sensitive information, is honoring our markings of confidentiality.

BALANCING OF RIGHTS UNDER FOIA

It has been said before that there is sorely lacking in FOIA any semblance of symmetry—balancing the rights between the submitters and the requesters. I have been heartened to hear the panel before me allude to the desirability of increasing the balance.

In our view, the most pressing need is for legislative relief that would give dependability to our trade secret protection.

Ms. Campbell and Mr. Vladeck, in talking about the informal hearings, referred to the lack of necessity that they be ex parte hearings.

I would remind you that information is discussed at those hearings which is the very subject of the dispute as to entitlement to trade secret status. If the other party learns of the information at a hearing, it makes no difference whether confidentially is compromised by that route or by granting the request. I understand that when some of these cases get to court, the requesters withdraw their requests rather than destroy their anonymity—reflecting the competitive motivations at work.

I want to touch on one important aspect of S. 1247. Among the changes proposed in S. 1247 is a workable test that could define, as was the Congress intent in 1965, what information is entitled to trade secret status—that is, information customarily not released by its originator.

The test of customarily released has degenerated to whether release would cause substantial harm to the competitive position of the submitter. That is the test today.

I suggest that if this test is to be diligently and uniformly employed, there is going to be need for the same kind of market data, legal analysis, and economic studies normally reserved for antitrust cases. And the test applies to each bit of information for which trade secret status is claimed. This is simply impossible. We need to return to the test of whether the information is customarily released by the submitter.

But this is not enough. Reference was made by another speaker to a safety valve, and we are perhaps sliding over that concept too lightly.

There must be provision for obtaining information, even if it is in the trade secret category, where the requester makes a clear and convincing case that the failure to provide this information would impair some overriding public interest.

I think, while there are loose words in that definition, they do afford an adequate opportunity for demonstration of a need by consumer groups and others to gain access to this information for proper purposes under FOIA.

Senator GRASSLEY [acting chairman]. Mr. Whale, may I interrupt you for a minute?

Mr. WHALE. Yes.

Senator GRASSLEY. I only have 7 minutes left to vote. I am going to have to apologize and leave. I promised Senator Thurmond that I would stay here until 11:20, but by the time I go and vote, there will not be any coming back time.

I think Senator Thurmond will return.

In lieu of Senator Thurmond and myself, I am going to have staff chair the meeting and continue to take your testimony, so that we do not hold up valuable time of people who have yet to testify.

I have four questions that will be asked by staff if I am not here. We would appreciate the whole panel responding to these questions.

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I would also like to remind you, if you can, to complete your testimony in 5 to 7 minutes so that we will have time for questions as well.

I am going to have to depart now. Thank you all very much. Would you continue, Mr. Whale?

Mr. WHALE. I am through, Senator, except to say that I think the protection of trade secrets has an important bearing on innovation in all technologies requiring substantial investments.

In fact, there is a distinct and necessary relationship between the feasibility and, hence, the magnitude of investing and the dependability of reasonable patent and trade secret protection.

I suggest that this, too, should enter the equation of the national interests addressed by the Freedom of Information Act.

Thank you.

Mr. RADER [acting chairman]. Thank you.

[The prepared statement of Mr. Whale follows:]

Prepared Statement of Arthur R. Whale

This statement is in support of amendments to the Freedom of Information Act, 5 U.S.C. 552, in the nature of those contained in S. 1247. These views are supplementary to my testimony before the Subcommittee on July 22, 1981.

Eli Lilly and Company has a significant interest in the Freedom of Information Act (FOIA). We are engaged in the discovery, development, manufacture and sale of chemicals for human health, cosmetic and agricultural use, and of medical device systems for hospital use. In 1980 we spent over $200 million for research and development in these fields.

Nearly all our products are subject to regulatory review by one or more federal agencies. Our confidential information embodying trade secrets important to our operations are frequently requested by and delivered to these agencies; this information then becomes part of the government records subject to release to third parties under FOIA.

Our problem is not with the underlying purpose of FOIA, which we understand to be the assessment and monitoring of the operations of our government. Rather, our problem is with the uncertainty spawned by FOIA through the proliferation of rules, practices and policies in the many statutes and implementing agencies that control release of our confidential information.

We have found sympathetic understanding in many government quarters of the value of our trade secrets and the consequences of their loss to competitors. But FOIA has departed from its intended purpose and has been interpreted to leave with the agencies the burden of determining what is to be accorded trade secret status. This produces a practical impossibility of uniform or even fair application of FOIA by the agencies. FOIA does not really recognize the rights of submitters of information; it is structured to favor requesters, without regard for the purpose of the disclosure requests.

We are handicapped in our lack of ability to document with certainty the extent to which we have been harmed by releases through FOIA. But this does not diminish our concern, for the potential is clearly there behind the competitors' requests and the blind requests for our information and the defenseless posture in which submitters find

themselves under FOIA.

I will discuss below a number of truths and consequences of FOIA as we see them:

1. What types of technical information we give to government agencies.

2. The importance to us of the subject matter involved.

3. Uses of the Act that result in dissipation of trade secrets and which have little or no relevance to the underlying purpose of FOIA.

4. The limitations on protecting much of this technology through patenting.

5. Why there is not a wealth of publicly known "horror tales" of experiences with FOIA.

6. Problems in the administration of FOIA as presently constituted.

7. Resolution of these problems in S. 1247.

The developers of technology, either voluntarily or under statutory compulsion, submit technology often constituting trade secrets to agencies of our government. The purpose of these submissions is to comply with the laws respecting the health and safety of our citizens. It is not the purpose to take from the technology-rich for the Robin Hood purpose of giving to the technology-poor. Indeed, the same technology given to the government, if taken without authorization by an employee, or stolen by a competitor, could result in legal sanctions, including imprisonment of the individuals responsible.

Nevertheless, through FOIA our competitors and even foreign governments and citizens of foreign countries can, for the price of postage and copying, receive enough information to aid them in competing unfairly with the originator. When so used, the FOIA comes to mean "For Our Inquisitive Adversaries" and is distant in purpose from the law's original intent.

Our nation's interest in encouraging investment in innovation is not consistent with the leaking sieve philosophy that compels disclosure of technology but then permits access to trade secrets by competitors, or, at best, consigns them to an uncertain fate in the hands of government agencies.

1. What We Give to Government Agencies

We at Lilly (and others in our industry active in developing new drug and agricultural products) are called upon to produce information for a number of government agencies. Of particular concern with respect to our technology are submissions to the Food and Drug Administration (FDA), Environmental Protection Agency (EPA), and Occupational Safety and Health Administration (OSHA), sometimes in conjunction with inspection visits by federal and state employees or contractors.

The following is typical of information we supply:

a. New Product Compositions. While the active ingredients, of course, must appear on the product label, the small amounts of special purpose ingredients for achieving pharmaceutical elegance, adapting the characteristics of a chemical to pharmaceutical finishing operations (such as capsule filling and tablet punching), materials that aid dissolution and improve drug distribution in the body, and other additives with special functions are often valuable trade secrets.

b. Processes for Making New Drugs and Agricultural Chemicals. Frequently the process of manufacture, or at

least the most efficient and economical process, is not suggested in the chemical constituting the active ingredient. The process information submitted must be sufficiently detailed to assess the likelihood of impurities in the final product or contamination of the working or public environment unless certain procedures are adopted. These processes often contain trade secrets important to the economics of production but not protectable by patents.

c. Laboratory Test Data. These data describe the minute quantities of other materials sometimes persisting to the final product and, for new drugs, may become the standard by which the products from other sources are later compared. Sometimes such test data alone can suggest the process and purification procedures used in making the drug even without the details being outlined.

d. Test Procedures. Where, for example, a possible impurity could be a substance susceptible of cumulative effects in the body or the environment, it is essential that the presence and amounts of such materials be identified. Sometimes the investment of considerable time and money goes to establishing these procedures, although standardized procedures prescribed by the agency are often employed.

e. Toxicological Data. In the early consideration of a drug, careful study must be given to its effects on appropriate laboratory animals. These tests represent both short and long term studies and are accompanied by careful analysis of the results. Data from these tests, depending on the agency, may be published or summarized for public access.

f. Metabolic Pathway and Fate. It is important that the path traversed by a new drug in the body and the effects of various enzyme systems and internal reactions involving the drug be learned as part of the assessment of the drug's effectiveness, duration of action and the form of the drug as finally absorbed or excreted. This information (but not always the detailed procedures) is usually published.

g. Pharmacological Data. The effects of the drug on various organs of the body must be established not only to understand the rationale of action but also to identify short or long term adverse effects. These data are generally released for public access.

h. Clinical Results. When a drug has successfully traversed animal and laboratory studies, the results are submitted to FDA for permission to conduct clinical trials by physicians selected for their experience and

reputation in use of drugs for the clinical indication being explored. These clinicians record data and observations and submit reports to the company as part of the company's application to FDA for approval to market the product.

i. Safety Data. Extensive data, comprising much of the information indicated above, must be pulled together to demonstrate safety. FDA makes such data available in summary form.

j. Efficacy Data. Similarly, the effectiveness of the drug must be described in detail from the data of various studies. Again, such data are made available in summary form, and individual studies are often published.

k. Tissue Residue. Data concerning the drug or a degradation product from the drug remaining in the tissues of animals must be explored and reported in connection with approval of animal health products where the animals are ultimately to be consumed by humans.

l. Good Manufacturing Practices. FDA must satisfy itself, by actual inspection of production facilities, that we are following acceptable practices in the handling of the ingredients of drug products and in processing them to final form.

m. Premanufacturing Notification. EPA requires notification in advance of the manufacture of a new chemical. We are called on to identify the chemical, together with any byproducts or impurities produced, process information and health and safety data. From this information EPA determines whether further investigation is required in the interests of health and environmental safety.

n. Effluent Analysis. Periodically, EPA requires information concerning the analysis of air and liquid effluent streams. Again, this is related to considerations of potential health and environmental effects. Such reports, even absent other process information, can convey trade secrets by revealing, for example, use of special solvents for extraction or purification procedures.

o. Information from Plant Inspections. EPA and state personnel and private contractors employed by EPA and OSHA personnel visit our plants to gain on site information as to processes, effluents, materials used, storage and handling procedures and waste disposal. Contractors are sometimes consultants for industrial organizations, and efforts are usually made to place them under specific obligations of secrecy.

On occasions, Lilly resists delivering the infor-

mation requested by FDA, EPA or other agencies. The usual reason for taking this position is that the request is believed excessive, cumulative or otherwise unnecessary. An important consideration underlying most objections is the prospect that the information may find its way into the hands of our competitors through FOIA.

Some agencies, like FDA, are highly selective in the information they give up. Some agencies, such as EPA, endeavor to provide brief notice and an opportunity to object to the release. However, in the case of EPA the agency administers five statutes having different provisions that affect the handling of trade secrets. This gives rise to different rules and practices within the same agency, an uncertainty compounded by differences among the various agencies that in some way receive our information and may be requested to give it to third parties under FOIA.

While most companies mark as confidential those papers or information they regard as constituting trade secrets, it is ultimately the decision of the agency that controls. That means two important things: first, the decision is often made by an agency employee who, however well intentioned, is not adequately informed to make a judgment as to entitlement to trade secret status; and second, even if the company believes the information should

not be released, it may only hear of it after the information has been released.

Exemption Four of FOIA ostensibly gives protection against release of trade secrets. Congress clearly, by legislative history as recorded in both Senate and House reports, intended this to be reflected in administration of the Act. However, it didn't work out that way, as I will note later in this discussion. FOIA is a disclosure statute and has been interpreted with a constant bias favoring disclosure. Even Exemption Four has been of little help against improvident release, for it has been applied only to enable an agency to resist disclosure if it desired and not to mandate nondisclosure of trade secrets.

2. Importance of Information Available Through FOIA

We are a high technology, research-intensive company that depends primarily on our own research and development as the source of new products and processes. As such, we must protect the results of our multi-million dollar yearly investment (over $200 million in 1980) in research and development. If we knew our R&D would be made available to competitors for their free use, we simply could not commit that kind of money to creating new products. We rely heavily on patenting for part of our protection, but patent-

ing is far from the total answer, as I will discuss below. Trade secrets remain an essential part of our commercial and competitive strength.

Information thought to be of minor consequence, such as bits of intelligence about processes, reactants, conditions of temperature and equipment used, are, indeed, without consequence taken by themselves. But the accumulation of various pieces of intelligence from various agency reports can be combined to yield an important picture of a competitor's operations.

Inevitably, the prospects of loss through FOIA tempers the instinct to divulge voluntarily the information requested by federal agencies. The tendency is to resist disclosure of information where an argument can be made that it is not necessary for the agency's discharge of its responsibilities.

Much of the many millions of dollars required to develop a new drug or pesticide is for the development of methods for synthesizing the chemicals and scaling up from laboratory to plant capacity, and much of it can be protected in no way other than by keeping it out of the hands of competitors. Unless the company chooses to license or is able to patent important results of those investments, loss

through FOIA literally imposes a compulsory free license system on technological activities. So far the Congress has consistently refused to make compulsory licensing a part of our patent or other laws; but the provisions of FOIA permitting misuse of that important law brings on us, inadvertently, the same consequences as if the Congress had deliberately declared by statute that technology was to be shared with all who wanted it--including foreign competitors and governments.

It is the lack of consistency between agencies and the individual interpretations of entitlement to trade secret status that bring uncertainties to the business of creating and utilizing technology. The "local option" approach is not serving the purposes of FOIA or the cooperative relationship that should exist in the industries subject to regulatory review.

3. Uses of FOIA

An estimate presented at the July 15 session of this hearing places the total cost to the government of administering FOIA in 1980 at about $57 million, up from $47.8 million in 1979. Companies, depending on the agency involved, may be required to justify trade secret status either before or after submitting the information, whether

or not a request for release has been made. This often means the agency is working with "stale" assessments, but the severe time constraints placed on the agencies and submitters (where the agency notifies the submitter of impending release), make it virtually impossible to bring adequate study to bear on entitlement to trade secret status before the agency must act on a request for release.

As a consequence, the loss of time and money by companies in meeting the burdens of FOIA is likewise enormous. But of far greater importance is the actual or potential loss of valuable trade secrets through FOIA to competitors. There is no way of knowing who gets the information, but it is common practice for companies to file their own FOIA requests when they see requests made by other parties, usually through blind requests, to see what was given up by the agency. There are occasions, too, when the only way a company can gain access to reports made by an agency about its own products or the results of an inspection of its own plant is to make its own request through FOIA.

You have heard from testimony by the Department of Justice that over 85% of FOIA requests of FDA originate (1) with private services whose business it is to make blind requests on behalf of parties wishing to remain anonymous, (2) with companies interested in learning about other

companies and (3) with private law firms inquiring on behalf of interested clients. About 70% of FOIA requests to EPA originate with these sources. Only 3% of requests to FDA in 1979 originated with identified public interest groups and members of the press.

We at Lilly on occasions use FOIA. For example, a meeting with agency officials results in a summary of the meeting prepared for agency files. This summary is available to our competitors through FOIA, and only through FOIA can we ourselves get a copy. We use it to get a copy of an agency report following an on-site inspection of our facilities. We use it to learn what of our documents are being given up through FOIA to other requesters and to note the extent to which our claims of confidentiality are being followed. We use it to learn of potential patent infringement by finding out whose facilities for manufacturing the infringing product have been inspected for agency approval and whose products have been cleared for marketing but have not yet appeared on the market.

The annual cost of servicing FOIA requests by government agencies is many millions of dollars more than would be required to satisfy the legitimate and important purpose for which the Freedom of Information Act was adopted. The value of trade secrets given up is indeterminate, but

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the potential is enormous (see Section 5 below).

4. Limitations of Protection Through Patenting

The final products themselves, in the case of my company, are usually patented. Indeed, this is considered virtually a prerequisite because of the enormous expenditures for new drug development--estimated for new chemical structures at about $70 million from the time of discovery of activity through the seven-to-ten-year course of uncertain technical and requlatory procedures to a final product. Patents are critical to major financial commitments. (Recognizing this, the Senate recently passed S. 255, a bill to add to the normal patent term, with limitations, the period consumed in a premarketing regulatory review mandated by statute.)

Today's drugs are often exceedingly complex in chemical structure. As such, the price of these products is influenced considerably by the processes for making them. Accordingly, in addition to patents on the products themselves, we seek also, wherever possible, to patent the processes.

But process patents generally do not afford dependable protection. It is usually not possible to gain

sufficient information about a process, particularly one involving many steps and procedural details, to conduct the process research necessary to identify the full range of equivalent steps and procedures that would achieve substantially the same results as claimed in the patent. In other words, it is relatively easy to invent around a process patent.

Moreover, many of the important process aspects are represented in a combination of individually minor and unpatentable techniques, such as the time and temperature of a reaction or a specific pressure that works better than others. So the scope and interpretation of a process patent may not give us dependable protection.

Whatever kind of patents we get, they are endlessly assailable by competitors who will find new "prior art" (the chemical literature alone more than doubles every ten years) or other reasons why the patents should not have been granted and invent new interpretations of the statute to defeat validity. Patent litigation is notoriously complex and expensive. A major contributor to this unfortunate situation is the disparity of understanding and philosophy among the courts called on to hear patent litigation cases--and hence the perpetual uncertainty and frequent failure of a patent to give protection against minor variations in the

product or process.

(I digress to emphasize the importance to us of passage of S. 21, introduced by Senator DeConcini and joined by a number of other senators. This bill would create a Court of Appeals for the Federal Circuits, a single court that would hear appeals in patent cases from federal district courts throughout the land. We consider S. 21 a major step in bringing needed consistency to the interpretation of the patent law and to the strengthening of the patent system in support of the investment in innovative efforts in all fields.

The frailties of product and process patents place great emphasis on the importance of trade secrets represented in the information we deliver to government agencies. Trade secrets include technical information that is not patentable and information that is the subject of patent applications not yet issued; such information constitutes a form of property protectible under the common law and in many states by special statutes, so long as the secrets remain secret and measures are taken continuously to keep them that way.

Trade secrets therefore represent a significant portion of the millions of dollars invested in new drug and

process development. Indeed, the more expensive the development, the more important are patents in protecting that investment--and the more important, likewise, are trade secrets in view of the significant loopholes, weaknesses and limitations in patent protection.

To the extent this information becomes available to competitors under FOIA, the competitive advantage of the originator is diminished and investment in future efforts becomes less feasible. Robert Hershey, writing in the September-October 1980 issue of Harvard Business Review, advises corporate management to familiarize itself with the kinds of reports required by government agencies. He says, "[b]y so doing, you not only become aware of what information you might obtain about your competitors, but you can also determine what they might learn about you."

5. Where Are the Horror Stories?

It is logical to ask what specific instances Lilly and others can point to in which technology has been lost through FOIA. The answer is simply that we don't have an answer.

Although most of us can identify instances where we know or suspect information has been lost, sometimes

through error or misunderstanding by the agency, the degeneration of FOIA into an organized, legitimate and anonymous "espionage" facility makes any assessment most difficult. Requests for documents through FOIA, although available to us through various organizations established to peddle such information, are in many cases blind requests. And even the incidences of which we are aware will seldom receive public notice, for we would not want it publicly known how important or critical the information was to us. Anyway, dissipation of our trade secrets to one competitor is better than dissipation to two or more competitors.

Nor do we known the effect of trade secret loss on our licensing activities. I know of one case in which a Japanese firm was negotiating for unpatented technology from a major U.S. chemical company and suddenly withdrew its request for a license. Subsequently, the U.S. company learned that the Japanese firm had simply met its needs through an FOIA request and required no further information as a dues-paying licensee.

It is a self-proving proposition that valuable trade secrets are lost through FOIA. This follows inevitably from a knowledge of how FOIA is used, the wide variations between regulatory statutes and, accordingly, the implementing agency policies and regulations, and the mani-

fest disregard for rights of the submitters of information.

6. Philosophical and Procedural Problems of FOIA

We acknowledge the necessity for delivering our technical information to various regulatory agencies, and even the propriety of making this information available, under adequate safeguards, for noncompetitive purposes in assessing the functions of our government agencies. But we earnestly urge that a balancing of the rights between submitters and requesters is necessary to make the law work as it should.

The requester, being the one who initiates the request, is aware of the pendency of that request in the agency. The submitter, however, is not, unless the agency chooses to tell him. There is need to provide, as a uniform practice among the agencies, for prompt and adequate notice of the request to the submitter.

If the agency denies the request for disclosure, the requester can argue his position to the agency. There is corresponding need for oportunity for the submitter to present his objections to disclosure.

Where the subject matter involves trade secrets,

there is need for a hearing at the agency level for a direct interchange on the question of confidentiality. The requester, of course, should not participate in the hearing, for sensitive matters will be discussed.

The requester, having the timing and sequence of events either within his control or his knowledge, can go to court to press his request against the agency. Unless the submitter, even at this late date, learns of the pending court action, he does not even have a chance to participate. There is need for prompt notice and opportunity for the submitter to press his position on the court. True, a court action to enforce a request means that the agency is resisting disclosure. But the resources and diligence of the agency in protecting the submitter's interests will inevitably be subject to the lesser motivation of the agency in protecting the information. After all, the agency is merely defending a policy decision. It is the submitter's ox that is up for goring.

The requester can go to court as a matter of right to compel disclosure; the submitter likewise deserves his day. However, the submitter's case should not be limited to arguing the basis of the record made in the agency, for that record will not reflect the considerations most relevant to the submitter's interest or contain information only

the submitter could supply concerning the reasons for confidentiality and the consequences of improvident disclosure. The submitter therefore needs a de novo review in the court, where he can supplement the agency's record with testimony and data of his own.

We have seen that there was no attempt in the Act to balance the rights of the private submitter against the rights of the requester. Ultimate discretion for assessing the legitimacy of the plea of the submitter for nondisclosure was left with the agency, and Exemption Four, designed to give the submitter at least an opportunity to persuade the agency against disclosing, really gave the submitter no significant recourse.

We noted that the requester can go to court to compel disclosure where an agency refuses to give the information, but unless the submitter is advised of the request he has no opportunity to intervene. Once advised, however, submitters have resorted to "reverse" FOIA suits to enjoin agency disclosure. And then came the decision of the Supreme Court in Chrysler v. Brown, 441 U.S. 281 (1979), in which the submitter was denied standing to sue the agency and get a pre-release de novo review of the submitter's contentions respecting nondisclosure. Judicial recourse for submitters was thereby limited to challenging an accom-

plished release as an abuse of an agency employee's discretion under the virtually moribund Trade Secret Act, 18 U.S.C. 1905. Even then, review was to be based only on the agency's record made in the agency's consideration of the matter. Anyway, it is of little solace to the submitter what happens to the gatekeeper after he has opened the gate!

The first test of disclosure applied by the courts after FOIA became the law in 1966 was whether the information would "customarily be released to the public." The Senate report, appearing as Senate No. 813, 89th Congress, 1st session (1965), described the purpose of the Fourth Exemption covering trade secrets as follows:

> This exception [to release] is necessary to protect the confidentiality of information which is obtained by the government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. (Emphasis added.)

However, subsequent judicial interpretation eroded this test to one in which release was to be withheld only if it would be "harmful to the private interest" of the submitting party. Finally, recent decisions have adopted the

"competitive harm" test in which the agency was charged with the impossible task of determining whether disclosure would be likely "to cause substantial harm to the competitive position of the person from whom the information was obtained." This test literally destroyed any residue of reasonableness in implementing FOIA, for it required, if properly applied, the technical, financial and market analyses akin to complex determinations in an antitrust case prior to release of any information for which the submitter had claimed confidential status.

Our problem now is to accord protection to trade secrets where disclosure would not serve the real purpose of FOIA and could endanger valuable technology considered confidential by a submitter. Clearly, the submitter is in the best position to assess the need for confidentiality in the total context of his operations. Just as clearly, the submitter may not be in the best position to judge the need for disclosure pursuant to a genuine public interest as envisioned by the Act. To meet the needs of the submitter, we should let him determine, subject to one exception, what should be kept from the eyes of his competitors by the receiving agency. To this end, the first and basic test should be whether the information delivered to the agency would "customarily be disclosed to the public" by the submitter.

Standing alone, however, such a test could plausibly be said (a) to transform FOIA into a closure rather than a disclosure statute and (b) to result in such disparate standards of permissible disclosure as to make the statute, in this respect, essentially without dependable meaning. Accordingly, the statute should be worded to provide a safety valve against inordinate withholding so an agency could disclose information which should be disclosed to comport with the true purpose of the Act. The amendment should therefore also provide that information in the Exemption Four category would be disclosed if (but only if) the agency could show by clear and convincing evidence that failure to disclose would seriously injure some overriding public interest.

7. Solutions

Each of the needs alluded to are addressed in S. 1247, introduced by Senator Dole, who was joined by Senator Hatch and others. It gives symmetry to the rights of both submitters and requesters by providing notice of a request; opportunity for objections by the submitter; a hearing by which the agency can learn from the submitter what it needs to know to render a decision; time for court action by the submitter in a de novo review of the claim of confidentiality, and a reasonable test for disclosability

with adequate safeguards for submitters and for the public interest. Exemption Four would be made mandatory against disclosure (instead of merely permitting nondisclosure, as pronounced in Chrysler), except where a supervening public interest can be clearly and convincingly demonstrated.

Conclusion

S. 1247 responds to a bad situation that is worsening with time. As now constituted, FOIA has a built-in bias against the protection of trade secrets and, consequently and proportionately, against the investment in innovations that could become a competitor's free ride. The present bill discourages voluntary submission of information which otherwise would be submitted to government agencies, putting both the agency and the submitter in contentious relationships that are increasingly ending up in court.

The need for consistent application of FOIA among the agencies, dependable protection of trade secrets, reduction of litigation over agency disclosures and recognition that the patent system has inherent limitations as a means of protecting rights in important technology is adequately acknowledged in S. 1247.

Times have changed since the Freedom of Informa-

tion Act was adopted in 1966. We are talking about a statute having as it purpose the opening of agency records for public review and for assessment of agency performance. But we are also talking about a law that is utilized for its proper and intended purpose by a distinct minority (3% in the case of FDA) of those utilizing it at all. It is no sacrifice of the public interest to preserve access for those whose purpose would meet the test of public interest, while at the same time alleviating the misdeeds visited on submitters and the unjustifiable burdens imposed on the agencies by the rest. We believe the approach adopted in S. 1247 would best serve the needs of all.

Arthur R. Whale

July 22, 1981

Mr. RADER. The next witness is Mr. Prospere Virden, senior counsel with Honeywell, Inc.

Mr. Virden is current chairman of the American Bar Association's Contract Committee and has published often on the subject of Federal contracts.

STATEMENT OF PROSPERE S. VIRDEN, JR., SENIOR COUNSEL, HONEYWELL, INC.

Mr. VIRDEN. Thank you.

Honeywell greatly appreciates the invitation of the Subcommittee on the Constitution to testify at these hearings.

Honeywell is a broadly based manufacturing company specializing in controls and computers with combined annual sales approaching $5 billion. Accordingly, we submit many types of documents to the Government which are required of all corporations with similar product lines.

Approximately one-quarter of our business is with the Federal Government, so that we furnish a great deal of additional information as an essential part of the acquisition process whereby the Government obtains its goods and services. As a submitter of substantial information to the Government, we are affected by and vitally interested in, the implementation of the Freedom of Information Act.

The Freedom of Information Act has served a very salutary purpose in permitting citizens to obtain information on how its Government operates. Honeywell endorses the basic principles and objectives of the Freedom of Information Act. However, there have been some abuses of the Freedom of Information Act which were never intended by the Congress.

Of greatest concern to those of us in industry is the employment of the act to obtain competitors' trade secrets and confidential business information.

My testimony will focus on documents submitted to the Government in the procurement process. It is this area that has caused Honeywell the greatest problems with the Freedom of Information Act.

The obtaining of trade secrets and confidential business information under the Freedom of Information Act has the following adverse consequences.

First, many of the documents submitted to the Government in the procurement process are done so with a legitimate expectation that they will not be released outside the Government, and especially not to our competitors.

Decisions by the courts have struck down this expectation and have held that agreements of confidentiality cannot be relied upon.

Second, contractors are reluctant to describe in detail innovative approaches, for fear that competitors will obtain their novel ideas under the act.

As one court has stated, this will have a chilling effect on the willingness of potential bidders to submit proposals to the Government.

Third, the untoward amount of litigation and the duty of the agencies to comply with the extensive traffic in Freedom of Information Act requests for documents which contain trade secrets and

confidential business information have been an overwhelming administrative burden—both to the Government and to the private sector. This is not only wasteful but, in our view, in many cases it is unnecessary.

The root of the problem is the conversion of private documents into Government records upon possession or control by the Government. We do not agree that every document submitted in the procurement process automatically becomes a Government record merely because it enters the Government's files.

Additional problems arise from the fact that while the courts initially adopted a customary release test, at the present time we are dealing with a substantial competitive harm test, which has been adequately covered by Senator Hatch and Mr. Braverman and Mr. Pulley and the undue burden of proof placed on the submitter in meeting this test.

Some of the documents submitted by contractors to the Government represent company property. These property rights generally are not taken into consideration in processing a Freedom of Information Act request.

There is no uniformity as to whether or not the submitter of the document will be notified. In those cases where notification is not made, the submitter has no defense to the release of the document.

The time limits stipulated in the Freedom of Information Act, when considering whether to withhold or release documents submitted in the procurement process, are unrealistic. There is not enough time to develop a record or for the submitter to prepare the detailed justification to prevent disclosure.

Government agencies take differing views as to how the act should be implemented. In order to prepare an effective defense against release, the submitter under very severe time constraints must the find out particular practices of the agency involv.

The *Chrysler* decision, which has been mentioned earlier today, has created great uncertainties to those of us in industry as to just how to proceed and just what the relationship is between the Freedom of Information Act and the Trade Secrets Act. This should be corrected.

In the face of all these problems, technical, cost, and management proposals, submitted by industry, invariably contain trade secrets and confidential business information. These proposals express innovative ideas, evidence of technological breakthroughs, and state-of-the-art solutions which the prospective contractor must put forth to win the contract.

Despite the fact that an agency may agree or a court may order the withholding of some or all of the proprietary information, it must be emphasized that the process in response to a Freedom of Information Act request, both for the submitter and for the Government agency, is tedious and time-consuming.

I would like to add that based on my research of the case law with respect to technical, cost, and management proposals that, in all instances which I have been able to discover, the requests that have led to these suits have been made by competitors. In my experience, I do not know of any request for a technical, cost, or management proposal that has come from a private citizen. They have all come from industry or corporate sources.

There have been requests for other documents, such as independent research and development submittals, technical and audit reports, and overhead rates which have been expensive and time-consuming in protecting against release.

Honeywell believes that the problems with the Freedom of Information Act can only be effectively dealt with by remedial legislation.

Simply stated, the legislation should eliminate those practices which were unintended by the Congress in the first place.

Honeywell makes the following specific recommendations, most of which are embodied in S. 1247.

First of all, submitters of information to the Government should be notified of a Freedom of Information Act request for proprietary information when it is received.

The substantial competitive harm test should be abandoned and proprietary data which would not customarily be disclosed to the public, would be protected from release.

Where the agency has obligated itself in good faith not to disclose proprietary data, this likewise would be protected from police.

To better implement this, we would suggest that agencies should be permitted to designate in good faith certain categories of documents which, because they usually contain proprietary information and are not customarily disclosed to the general public, would not be disclosed outside of the Government.

I am thinking, in particular, of technical, cost, and management proposals, I. R. & D. submittals, and some of the other areas that invariably contain this type of information and, therefore, should be considered as a category, as opposed to having to examine each document as to whether or not it is customary to release it.

Exemption B(4) should be made mandatory rather than discretionary.

Submitters should have the opportunity after notification to provide in writing or at a hearing, legal and factual justifications as to why the documents should not be released. In many situations, in response to a Freedom of Information Act request, because of time constraints much of which is not done by documentation has to be done on the telephone, which is an inadequate way to present the justification as to why the documents should not be released.

A final decision to disclose the information after the agency has considered the submitter's objections should, at the election of the submitter, be subject to a trial *de novo* in an appropriate Federal District Court.

These recommendations, if adopted, would materially cut down on the inordinate traffic now being experienced under the Freedom of Information Act. Not only will confidence be restored to the private sector, but abuses of the act will also be eliminated. The savings to both Government and industry are incalculable and would be in keeping with the aims of the administration.

Thank you.

Mr. RADER. Thank you very much.

[The prepared statement of Mr. Virden follows:]

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Statement of

Honeywell Inc.

to the Subcommittee on

the Constitution

of the

Committee on the Judiciary

Presented by

Prospere S. Virden, Jr., Senior Counsel

July 22, 1981

INTRODUCTION

Honeywell greatly appreciates the invitation of the Subcommittee on the Constitution to testify at these hearings. Honeywell is a broadly based, manufacturing company specializing in controls and computers with combined annual sales approaching five billion dollars. Accordingly, we submit many types of documents to the Government which are required of all corporations with similar product lines. Approximately one-quarter of our business is with the federal Government so that we furnish a great deal of additional information as an essential part of the acquisition process whereby the Government obtains its goods and services. As a submitter of substantial information to the Government, we are affected by and vitally interested in the implementation of the Freedom of Information Act (FOIA).

The FOIA was predicated on the salutary principle that citizens should be informed as to how its Government functions by having access to the information upon which its actions are based. Honeywell would like to emphasize that it supports and endorses the objectives of the FOIA that the Government be made more accountable to those which it serves by making available agency records for public inspection. However, the 1974 amendments to the FOIA and the judicial decisions interpreting them have mandated disclosure to such an extent that the time has come to evaluate and recommend appropriate remedial measures.

Experience since the 1974 amendments demonstrates that FOIA has been used or abused for purposes which were never intended by the Congress at the time of their enactment. The most prevalent abuse, and of the greatest concern to those of us in industry, is the employment of FOIA to obtain competitors' trade secrets and confidential business information which has been characterized as "industrial espionage."[1/] The legislative history of FOIA indicated a strong Congressional intent that sensitive and confidential business information which found its way into the Government's files would be broadly protected from release. As it has transpired, the FOIA has become a tool for competitors, public interest groups and others to examine documents which reveal the inner-workings of private business.

1/ Honeywell Information Systems, Inc. v. NASA, Docket No. 76-353 (D.C.D.C. 1976).

There are far reaching adverse consequences emanating from this abuse of FOIA, both to industry and Government. In order to more fully appreciate these adverse consequences, this statement will focus on a single category of documents - those submitted to the Government in the procurement process which contain trade secrets and confidential business information. Despite the (b)(4) or "trade secrets" exemption to FOIA, there is heavy traffic in requests for documents of this nature and they remain vulnerable to release. However, the lessons that have been learned from the problems associated with these types of documents and the solutions which they suggest, should have more universal application to correcting the abuses of FOIA.

In Honeywell's view, although certain improvements may be obtained by adoption of policies and regulations designed to act as deterrents to those who would seek a competitor's trade secrets and confidential business information under FOIA, the pervasiveness of the practice and the severity of the situation calls for remedial legislation as the only sure way to eliminate the broad spectrum of problems which the Government and the private sector have experienced under FOIA.

THE ADVERSE CONSEQUENCES

I. Distrust of the Government by the Private Sector.

Many of the documents submitted in the procurement process are not documents which a company would normally release to the

general public. In fact, most of the documentation is submitted with a legitimate expectation that it will not be released. This expectation is evidenced by the very nature of the document and in some cases by an express agreement. The expectation is further bolstered by the fact that the proprietary nature of the same information when exchanged in a commercial context is universally protectable from release to third parties by a simple "nondisclosure" agreement or an implied obligation not to use or disclose it.

In the procurement process it is customary, especially on large programs, for companies to form teams to bid on Government contracts. One of the team members will be identified as the potential prime contractor and the other team member or members will be identified as the potential subcontractor or subcontractors. If that team is successful and a contract is awarded to the prime contractor, the anticipated relationship becomes a reality. During the bidding process, the team members enter into an arrangement known as a "teaming agreement" which defines the rights and obligations of the individual team members. Since the team members are chosen primarily for their technical expertise, it follows that there will be an exchange of proprietary information in preparing the team's proposal to the Government. An essential element of a teaming agreement then is a proprietary data provision which provides that the information shall be used only in furtherance of the team effort, i.e., the submission of a proposal to the Government and which prohibits further dissemina-

tion outside the team. The reported instances of a team member violating a proprietary data provision are virtually nonexistent. In the commercial world, companies follow the precept of the Supreme Court in its statement of how trade secrets are viewed by the business community:

> "The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. The necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world."2/

Unfortunately, the agreements of confidentiality, which are universally honored in the commercial context, may be abrogated in industry's dealings with the Government even though the subject matter of the agreements may be the same. It would seem that where the Government is acting essentially in a business capacity, i.e., procuring goods and services, it would be able to follow the salutary principles of trade secret law as espoused by the Supreme Court and followed by the business community. However, the current state of the law is that contractors cannot rely on expectations of confidentiality nor, except under certain circumstances, will agreements by the Government to protect proprietary information be upheld.3/ FOIA was intended to create a sense of trust by citizens in being able to review the operations of its Government. In this instance, FOIA has had the opposite effect of creating distrust on the part of its corporate citizens when their

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2/ Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

3/ Petkas v. Staats, 519 F.2d 887 (D.C. Cir. 1974).

legitimate expectations and agreements of confidentiality are honored in their every day business relationships but may not be so honored when dealing with the Government.

II. Impairment of the Government's Ability to Obtain Similar Information.

The threat that trade secrets and confidential business information will be released to competitors impairs the Government's ability to obtain similar information in the future. There is at least one reported incident of a contractor declining a Government contract award when it discovered that the technical information it would be obligated to furnish was subject to disclosure under FOIA.[4/] However, the danger that trade secrets may be revealed under FOIA will not, as a general proposition, stop contractors from bidding on or performing Government work. The more telling consequence is that contractors are understandably reluctant to describe, in detail, innovative approaches and solutions to the Government's problems when bidding on and performing federal contracts. Faced with the loss of their trade secrets, contractors will tend to dilute, across the board, the amount of substantive technical and other crucial information which the Government receives. As one Court aptly described the situation, disclosure of a technical proposal would (1) have a "chilling effect" on the willingness of potential bidders to

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4/ Sikorsky Drops Bid for Copter Design, N.Y. Times, March 27, 1979, p.4, Col. 5.

submit proposals to the Government, (2) diminish the Government's chances of receiving meaningful proposals for fear that competitors would get the benefit of innovative theories, and (3) induce potential bidders to submit proposals that do not contain "novel ideas".[5/] This is an unfortunate state of affairs considering America's struggle to stay ahead in the technology race.[6/] In order to insure that the Government will have the most detailed, most advanced, scientific and technological information, better ways to protect such information from disclosure must be found.

III. Litigation and Administrative Burden.

The untoward amount of litigation which FOIA has spawned has placed an undue burden on the Courts and expense on the litigants. Federal trial Courts have decried the very burdensome demands on in camera inspection of disputed documents and the unreasonableness of expecting these Courts to do a thorough investigation particularly when the documents involved run to hundreds of thousands of pages. When this burden is coupled with the requirement that the agency or entity seeking to withhold the information must provide detailed justification known as a "Vaughn v. Rosen" statement,

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5/ Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980). See also, Fidell v. United States Coast Guard, No. 80-2291 (D.C.D.C. March 3, 1981).

6/ The Technology Race; America's Struggle to Stay Ahead, the N.Y. Times Magazine, June 28, 1981, p. 14.

identifying the precise reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply, you begin to get some idea of the enormous amount of work involved.7/

The great majority of FOIA activity does not reach the litigation stage. Nevertheless, in preparing a response to an initial FOIA request which involves trade secrets and confidential business information, the prudent submitter prepares as detailed a justification for non-disclosure as time will permit. These agency or administrative proceedings put litigation at the "tip of the iceberg" when assessing the overall burden and expense to the Government and the private sector. Now, we are grappling with documents whose population is one hundred-fold what is placed in litigation and, in their totality, run to millions upon millions of pages. Ironically the current procedure, as will be more fully described below, with respect to certain documents is not just burdensome but is for the most part, wasteful "wheel spinning".

IV. The Disclosure of Technical Information to Foreign Countries and Foreign Competitors.

Since any "person" may obtain documents under FOIA, representatives of foreign countries, their agents, or foreign business

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7/ Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); cert. denied, 415 U.S. 977 (1974)

competitors are able to seek trade secrets contained in technical data furnished to the Government by domestic companies. In the instances which involve critical areas of defense, the very same information could not be exported outside the United States under the Arms Export Control Act. As stated in litigation arising out of a request to the Department of Defense (DoD) for reports on E-Beam, High Power Transistor, Small Bubble and Silicon Target Technology:

> Release of this type of technical data would enable foreign countries to not only extrapolate the United States' present position militarily in this submicrometer technology area, but would enable these countries to formulate potential strategies relevant to electronic warfare and electronic countermeasures to overcome the anticipated advances in the United States' military technolgy. The data contained in these reports fall within the criteria set out in the Arms Export Control Act (22 U.S.C. App. 2403). The technical data contained in each of these reports would advance the military capability of foreign nations and the data can be used or adopted for use in the development of military equipment on the U.S. Munitions list.8/

Once however, the technical data has been released under FOIA, any argument that it will not be exported absent an export license, does not square with reality. As a practical matter, the

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8/ Siemans Corp. v. U.S. Department of Defense, Civil Action No. 78-0385 (D.C. Cir.).

information can easily be made available overseas since there is no mechanism to track each FOIA release to assure that it is not exported. Any doubts that global dissemination may be made of information released under FOIA is dispelled by the following note adopted by a Court:

> . . . once an agency has released a particular record pursuant to an FOIA request, that record is available to all the world for all time: the agency can neither prevent the requester from disseminating the document to others nor deny a later request for the same document by a different party. The agency must assume that any document disclosed under the FOIA will eventually and inevitably find its way into the possession of the submitter's competitors. (Emphasis added.)9/

CAUSES OF THE PROBLEM

I. "Conversion" of Private Documents into Agency Reports.

The root of the problem is the "conversion" of private documents into agency records upon mere physical receipt or possession by the Government. Although there is no legislative history as to what constitutes an agency record, the Courts have generally concluded that any document in the Government's files is an agency record regardless of its origin.10/ Despite what these Courts have said, we do not believe that every document submitted by the

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9/ General Motors Corp. v. Marshall, No. 80-1183 (CA4, July 17, 1981).

10/ Bristol Myers Co. v. FTC, 398 F.2d 18 (D.C. Cir. 1978).

private sector should Ipse Dixit become a Government record. It is paradoxical that the same document may cease to be a Government record once it leaves the Government's possession or control. Accordingly, we believe that an examination of what constitutes an agency record for the purpose of FOIA is of high priority.

II. The Substantial Competitive Harm Test.

The FOIA legislative history as expressed in House and Senate reports contemplated that Government agencies adopt the practice, which is followed in the commercial world, of obligating itself in good faith not to disclose documents which are not customarily made available to the general public.[11/] As expected, this intent was initially adopted by the Courts as the "customary release" test.[12/] In 1975, the Courts changed direction and redefined the (b)(4) exemption in devising a much more difficult hurdle known as the "substantial competitive harm" test. At the present time, commercial or financial material is "confidential" for purposes of the exemption only if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competi-

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11/ H. Rept. No. 1497, 89th Cong., 2d Sess. at page 10; S. Rept. No. 813, 89th Cong., 1st Sess. at page. 9.

12/ Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971).

tive position of the person from whom the information was obtained.[13/] The result of this decision has been to place an unnecessarily high burden of proof on the submitter who seeks to protect his sensitive commercial information from public scrutiny. The passage of time indicates that a test based on the intent, as originally expressed by the Congress, should be restored.

III. Property Rights of Submitter - Exploitable Resources of the Government

Except in the areas of Independent Research and Development (IR&D), little attention has been paid to the fact that many of the documents submitted in the procurement process represent property rights of contractors. The DoD legend on the form identifying IR&D data states explicitly:

> Furnished in confidence and subject to exemption under Subsection (b) of 5 USC 552. The information contained herein is the property of the company . . . is furnished for the sole purpose of identifying the subject program and shall not be disclosed other than to duly authorized DoD personnel. Any authorized reproduction or disclosure of the information contained herein, in whole, or part, shall include this notice. (Emphasis added.)[14/]

There are other documents furnished in the procurement process such as technical, cost and management proposals which contain

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13/ National Parks and Conservation Association v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

14/ DDC Form 271, Jan. 75.

trade secrets and confidential business information which likewise should be considered the legitimate property of the submitter. A Court has concluded that a Government agency, where the documents in question contain proprietary information which qualifies as a trade secret, has no right to make any of the information public under FOIA or any other act without providing adequate protection to assure confidentiality.[15/] Failure to provide such protection, when disclosure is compelled by the Government, amounts to an unconstitutional taking of property.[16/]

Similarly, many of the documents in the Government's possession have been developed with Government funds and represent a property right which should be considered as a valuable Government asset. In other words, the Government possesses an "exploitable resource." The DoD has in fact concluded that such exploitable resources, which include formulae, designs, drawings, research data, computer programs and technical data packages do not constitute agency records.[17/] Accordingly, documents which fall into the exploitable resource category should not be subject to release under the FOIA. That is not to say, however, that these documents

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15/ Wearly v. FTC, 462 F. Supp. 589 (1978); for recognition of the property right and protective order principle under State law see The Mountain States Telephone and Telegraph Company v. The Public Service Commission of Montana, No. 80-488 (Montana Supreme Court, September 8, 1981).

16/ See Wearly v. FTC, Note. 15, supra.

17/ DoD Directive 5400.7.

should not be released if it is in the Government's best interest to do so under an appropriate licensing agreement or other arrangement which adequately protects the Government's property rights.

The recognition of the constitutional protection afforded to property rights embodied in trade secrets should be endorsed and expanded. The concept that the Government's exploitable resources do not constitute an agency record and are not subject to release under FOIA may also have greater application. In either case, if property rights or exploitable resources may be obtained under FOIA, the requester gets something for nothing. This principle has recently been examined by a Court which concluded that:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government. (Emphasis added.)18/

IV. Time Limits

The time limits stipulated in the FOIA for responding to requests, usually ten days, are totally unrealistic for agency

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18/ Worthington Compressors, Inc. v. Costle, No. 80-1010 (D.C. Cir., August 20, 1981).

personnel to determine whether or not to withhold or release documents submitted in the procurement process which, in each instance, may total hundreds or even thousands of pages. Faced with the overwhelming mass of material and a tight deadline, the natural tendency is to release all the requested material as an expedient. As a practical matter, there simply is not enough time to to notify the submitter and permit the submitter sufficient time to prepare the detailed justification to prevent disclosure when the facts warrant. The time limits, including any extensions, are absolute so that when operating within the ten day limitation, if the submitter learns of the request on the ninth day, he has one day to prepare his response. Strict time constraints mean that snap judgments must be made under pressure often based on an incomplete record. If the wrong decision is made to release, the submitter has no effective remedy since FOIA provides no retrieval mechanism or restrictions on the use of documents once they leave the Government.

V. Notification.

The Office of Federal Procurement Policy has disseminated a policy to provide notice to contractors of a FOIA request for information which may fall within exemption (b)(4).[19/] While some agencies alert submitters that their documents are subject to

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19/ OFPP Policy Letter No. 78-3, March 30, 1978

a FOIA request as a routine matter, many agencies' regulations reflect no such duty. Simply stated, in those cases where the submitter is not notified he has no opportunity to defend against release and the documents are furnished to the requester, uncontested. Again, once the documents have been released the defenses against disclosure evaporate with them. Precepts of fairness and elementary due process dictate that a Government-wide obligation to notify the submitter is a key element in correcting this basic flaw in the FOIA.

VI. Lack of Uniformity of Treatment.

The submitter of information must be prepared to deal with agencies that take different views as to how FOIA should be implemented. Some notify that a request has been lodged as a matter of course or pursuant to regulation and others do not. What is a trade secret to one agency is not to another. Some agencies routinely seek time extensions to respond to FOIA requests and others do not. Some agencies require a detailed statement to preclude release, while others are satisfied with a one sentence claim of confidentiality. A submitter then must find out how the agency views FOIA in order to prepare an effective defense against release. In many cases, the ultimate disposition depends on the attitude of the particular agency, its expertise in FOIA matters, and even the individual perceptions of FOIA by agency personnel. While contractors are expected to cut square corners in dealing with the Government, it should be up to the Government to define

these corners. In the case of FOIA, the corners take many configurations and may be traps for the unsophisticated or the unwary.

VII. Uncertainty Emanating from the Chrysler Decision.

The Chrysler decision gave submitters two indirect forms of reverse FOIA lawsuits by establishing that (1) disclosure in violation of their provisions may be "not in accordance with law" under the Administrative Procedure Act and (2) they may be "withholding statutes" under FOIA exemption (b)(3).[20/] While industry welcomes these avenues of relief, the first remedy is inadequate since it is based on a record created by the agency in which the submitter has no rights to participate and the second continues to confuse because it has not been judicially established that the Trade Secrets Act (TSA) is a "withholding statute."[21/] In each instance, we believe that the problem should be addressed by a change to the FOIA to (a) permit reverse type suits de novo under the (b)(4) exemption to FOIA and (b) establish that the TSA is a statute falling within the (b)(3) exemption to FOIA.

20/ Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979).

21/ See e.g. Worthington Compressors, Inc. v. Costle, Note 18, Supra.

ANALYSIS OF FOIA REQUESTS FOR
DOCUMENTS SUBMITTED IN THE PROCUREMENT PROCESS

I. Technical, Cost and Management Proposals.

The technical, cost and management proposals, submitted to the Government in the procurement process, invariably contain trade secrets and confidential business information and provide the most graphic illustration of the problems which arise when they are sought by third parties, usually competitors, under FOIA. These proposals are generally submitted in response to a Government solicitation which delineates the agency needs. The regulations also permit a potential contractor to submit an "unsolicited" proposal in which a solution is proposed to respond to a Government problem about which the contractor has become aware. In either case, the contractor is allowed to place a restrictive legend on the proposal which, subject to the provisions of FOIA, limits the Government's use to evaluation purposes only. The objective is to present innovative ideas, evidence of technological breakthroughs, and state of the art solutions to convince the Government evaluators that your company is the best qualified to do the job so as to obtain the award of any resultant contract. It follows that a company, in order to win, must advance its novel approaches which are the essence of a trade secret. During the evaluation or pre-award phase, this technical data, together with cost and management data, is remarkably immune from disclosure to competitors or anyone else under FOIA. As a practical matter, the

bidders want to put their best foot forward with their customers - the Government procurement agencies - and it would be viewed as a poor marketing and business practice to seek competitive information under FOIA at this stage of the game. In the rare case that this has happened, one Court held that the information in the cost proposals, in the hands of a competitor prior to the time of final award, would: (1) jeopardize the Government's ability to discern clearly which bidder could do the best job for the lowest price; (2) not be in keeping with DAR 3-805.3(b) and (c) which prohibits bidding with knowledge of competing bids; and (3) encourage competing bidders to enter bids which did not accurately reflect their capabilities and their costs, so that the secrecy protected the bargaining power of each competitor's bid. Absent the assurance of this confidentiality, bidders might be reluctant to disclose such information to the procuring Government agency.[22/]

It is after contract award that the problem arises, usually when a disappointed bidder wants to find out how the successful bidder proposes to do the job or because there is some suspected irregularity in the award process. If the disappointed bidder protests to the GAO, their procedures do not permit an examination of the other proposals and the GAO consideration of this documentation is done in camera. The GAO responds to requests for

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22/ Shermco Industries v. Department of the Air Force, 613 F.2d 1314 (5th Cir. 1980).

this documentation by advising the protester to file a FOIA request with the appropriate agency.[23/] Likewise, a Court protest will generally require an in camera examination or provide a proper protective order. Protesters then may still employ FOIA extensively as a discovery tool because if the disappointed bidder-competitor wants to actually scrutinize the proposal contents, a FOIA request appears to be the best and certainly the cheapest solution.

In order to appreciate the amount of effort that must be expended in responding to a FOIA request for a technical proposal, there follows the normal steps in the FOIA process. Similar steps are taken when cost or management proposals are sought under FOIA:

1. A FOIA request is sent to the procuring activity for the proposal of the ABC company on the XYZ program.
2. The procuring activity, if its regulations require, and especially if the submitter has used the proper restrictive legends, will notify the submitter that the request has been made and offer the opportunity to object to its release.

23/ Matter of Systems Research Laboratories, Inc., B-186842.

3. The submitter, if he is familiar with the FOIA process, then assembles his technical team to screen the technical proposal to determine which portions are protectable. A "mini" Vaughn v. Rosen statement is then prepared and submitted to the agency to justify the non-releasability of those portions of the proposal which contain trade secrets and which satisfy the substantial competitive harm test. Reference to the Trade Secrets Act as an additional basis for non-disclosure is also made.

4. Government personnel then meet to determine, based on the submitter's statement, what portions of the proposal may be withheld. If the submitter has done a thorough job, some Government agencies will go along with the line as to what should be withheld as drawn by the submitter. Other agencies, no matter how persuasive the evidence, will contend that there are no bona fide trade secrets and are therefore inclined to release the proposal in toto. It is at this point in the proceedings that fairness would dictate that the submitter have his day in Court by filing a reverse FOIA lawsuit.

5. The requester is then provided with the disclosable portions of the proposal and the reasons why the balance will not be released.
6. If the requester is not satisfied with the agency explanation or still wants the documents despite it, he may appeal the initial agency action. At this juncture, the submitter is usually asked to reconsider what he deems are trade secrets and the agency writes a more detailed letter either affirming its prior stand or modifying it to permit the release of additional documents.
7. The requester may then obtain judicial review de novo of the agency's decision not to disclose.

A Court, in applying the substantial competitive harm test or by making a determination that release of the information may impair the Government's ability to obtain similar information in the future, may ultimately order that some or all of the proprietary information in technical, cost and management proposals not be released.[24/] However, it cannot be over-emphasized that prior to any Court proceedings, the administrative process at the agency

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24/ Audio Technical Services, Ltd. v. Department of the Army, 487 F. Supp. 779 (D.C.D.C. 1979); Orion Research, Inc. v. EPA, Note 5, Supra; Shermco Industries v. Department of the Air Force, Note 22, Supra; Fidell v. United States Coast Guard, Note 5, Supra.

is tedious and time consuming. The entire proceeding is repeated each and every time a request is made so that thousands of man-hours of Government and industry personnel are wasted every year going through this laborious procedure.

II. Other Documents Submitted in the Procurement Process.

There have been several instances of other documents such as Independent Research and Development (IR&D) submittals, reports and requests for overhead rates which have followed the same pattern as FOIA requests for proposals and the procedures to protect against release have been equally expensive and wasteful of Government and industry personnel resources. In one IR&D FOIA action, some ninety companies with negotiated IR&D ceilings were involved in defending against the release of their IR&D data. In the overhead rate incident, there were some twenty companies involved and cost information requested for 117 individual contracts.

RECOMMENDED SOLUTIONS

In order to improve the current state of affairs under FOIA it is first necessary to concentrate on reducing the enormous traffic in FOIA requests and responses. This can be done without abridging, to any appreciable extent, the rights of the seekers of information under FOIA. What is needed is a new look based on experience and an elimination of wasteful and counter-productive practices. The original Congressional intent and basic tenets of

due process and fair play should be restored. The following recommendations are all made with these precepts in mind.

While certain improvements can be made by regulation or changes in procedure, the major problems with the trade secrets exemption to FOIA cannot be corrected in a piecemeal fashion. Honeywell's specific legislative recommendations for comprehensive FOIA reform follow:

1. Submitters of information to the Government shall be notified of a FOIA request for proprietary information when it is received.
2. Submitters will have the opportunity after notification to provide written legal and factual justification as to why the documents should not be released. If requested, the submitter may be granted a hearing to more fully explain the reasons as to why the information should be withheld.
3. Agencies should be permitted to designate in good faith certain categories of documents which because they usually contain proprietary information and are not customarily disclosed to the general public, will not be disclosed outside of the Government. For example, technical, cost and management proposals which invariably contain trade secrets and confi-

dential business information would be placed in this category. In addition, agencies should be permitted to designate in good faith certain information that when received from the private sector does not automatically become an agency record. In order to obtain documents in either of these two categories, the requester would have to demonstrate an overriding public interest. Even where documents are released to a person under these circumstances, consideration should be given to preventing further disclosure by an appropriate protective order or agreement.

4. The substantial competitive harm test should be abandoned and proprietary data which would not customarily be disclosed to the public would be protected from release. Where the agency has obligated itself in good faith not to disclose proprietary data, this data would likewise be protected from release.
5. Exemption (b)(4) should be made mandatory rather than discretionary.
6. A final decision to disclose the information after the agency has considered the submitter's objections shall, at the election of the sub-

mitter, be subject to a trial de novo in the appropriate Federal District Court.

7. The Trade Secrets Act should be established as a statute falling within the (b)(3) exemption to FOIA.

These recommendations, if adopted, would materially cut down on the inordinate traffic now being experienced under the FOIA. Not only will confidence be restored to the private sector, but abuses of FOIA will also be eliminated. The savings to both Government and industry are incalculable and in keeping with the aims of the Administration. The statement made by the Court in the recent Agee case on the (b)(3) exemption to FOIA applies with equal vigor to the (b)(4) exemption:

> "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."25/

25/ Philip Agee v. Central Intelligence Agency, et al., Docket No. 79-2788 (D.C. D.C. 1981).

Mr. RADER. Our final witness today will be Dr. Stuart Bondurant, the Dean of the North Carolina School of Medicine.

He is the immediate past chairman of the Council of Deans of the Association of American Medical Colleges, immediate past president of the American College of Physicians, and a member of the National Academy of Sciences, Institute of Medicine.

He is accompanied today by Joseph A. Keyes, staff counsel for the Association of American Medical Colleges.

Dr. Bondurant, will you proceed?

STATEMENT OF DR. STUART BONDURANT, DEAN OF THE SCHOOL OF MEDICINE, UNIVERSITY OF NORTH CAROLINA; ACCOMPANIED BY JOSEPH A. KEYES, STAFF COUNSEL, ASSOCIATION OF AMERICAN MEDICAL COLLEGES

Dr. BONDURANT. Thank you.

If I may, I would like to introduce the written statement into the record and for the sake of time add a few brief comments, especially in light of the discussions that have already gone on this morning, if that is agreeable with you.

Mr. RADER. Your statement will be included in full at the completion of the oral presentations.

Dr. BONDURANT. May I say, first, that I am representing the Association of American Medical Colleges, which includes all of the accredited medical colleges in the United States, as well as the 400 major teaching hospitals in the country and some 60 or more learned scientific societies.

In addition, I am representing today the American Council on Education, which is a membership organization composed of 1,291 nonprofit institutions of higher education from both public and private sectors and 169 educational associations and organizations.

As an organization whose members include the overwhelming majority of nonprofit 4-year colleges and universities, this organization is uniquely able to represent the interests of higher education generally on matters of national importance.

In addition, my statement represents the views of the Council on Governmental Relations which is comprised of more than 120 leading research universities, which account for over 90 percent of the funds made available to higher education through grants and contracts for scholarship and research and which certainly in the aggregate account for a large amount of the innovative scientific enterprise of the Nation.

The perspective of these organizations is very consistent with many of the comments that you have heard this morning and is reflected accurately in the written statement before you.

I would observe that since the act was last amended in 1974, there have been three very significant developments that have influenced the way in which the Freedom of Information Act influences the institutions of higher education and the academic scientific process in the United States.

The first was a decision on the *Washington Research Project, Inc.* which concluded that research grant applications did not come under exemption 4.

The second was the decision in the *Chrysler* case in which the access of the submitters of information to process was stated to be

quite limited under the act. Quite important, ir addition, are some of the terms and conditions of the new patent law which went into effect on July 1 of this year.

These three new developments have created problems and substantial concerns for the academic community and for the scientific process which it is serving.

The remedies which are proposed in S. 1247 appear to us to go a very long way toward the correction of these problems. I would only advance briefly three modifications which I believe are entirely within the spirit and intent of the bill.

The first, and perhaps most important, is the need to clarify the issue of whether or not research grant applications are shielded from public disclosure as such.

It is the position and the view of the scientific community that research grant applications represent the product of the most fragile and sensitive creative genius of the country. As they are submitted, they are not the property of the Government but rather are the property of the creative genius of the individual who created them. They do, in fact, constitute proprietary information in the terminology of S. 1247.

The matter is left ambiguous, in our view, as to the intent of Congress with respect to research grant applications.

We would, therefore, urge that it be clarified by stipulating that research grant applications do in fact constitute proprietary information in this sense.

Certainly the recent experience with recombinant DNA technology and the industries that have grown up in academic institutions and with the faculty of academic institutions makes it clear that there are pervasive proprietary interests associated with research grant applications.

I might say, as well, in earlier panels that Mr. Braverman cited the example of submissions to the Government which may not have value at the time they are submitted but may subsequently turn out to be extremely valuable.

Mr. Vladeck challenged the situation by asking under what circumstances would such information come into the hands of the Government.

I would like to point out that this is a specific example of that. When an investigator submits a research grant application to the Government, he has no sure way of knowing what its potential proprietary value might turn out to be. Yet under the act as presently written, he is required to demonstrate such a value in order to bring the information within the scope of exemption 4.

Having said that, let me add that our experience, particularly with NIH, is consistent with the observations Mr. Vladeck also made that at least many of the agencies do have in place processes which inform the submitter of requests.

I do not mean to imply that I am prepared to cite horror stories of actual miscarriage of that information.

A second point for which we would like to urge amendment of S. 1247 concerns the language which defines the people who are covered. Specifically, the bill excludes Government employees, or employees of State or local governments.

It is a fact that some of the State universities in this country are separate from their State governments. California and Michigan are examples of this kind of State university. Others are not. The faculties of many universities are, in fact, employees of State governments. The University of North Carolina is an example.

Under the act as written, as I understand it, the faculty of the University of North Carolina would be classified as public employees and would, therefore, not have access to redress under the act, where the faculty of a private institution of higher education would, and the faculty of the University of California might.

I believe this was not intentional and could be simply remedied.

Finally, we would strongly support the improvements in the process which are included in S. 1247, including support for the de novo review proceedings which have been discussed earlier this morning.

We believe that in the area of some of the proceedings which might concern research grants, there would be some very pertinent examples of the value of de novo proceedings, as opposed to the other type.

We appreciate very much the opportunity to appear before you this morning. We welcome the opportunity to answer questions and to work with you in the future as this legislation matures.

Thank you.

Mr. RADER. Thank you very much, Dr. Bondurant.

We do have a few questions for the panel.

First, we have had testimony from other witnesses that a product's approval—or in your case, Dr. Bondurant it would be perhaps a research design's approval—carries with it a right of public disclosure as the price of being regulated, just as a patent holder must make disclosures in order to receive an issued patent.

Would you care to comment on that? Is that a proper view of the Freedom of Information Act? Do your submissions to the Government carry with them the supposition that they are to be disclosed?

Mr. WHALE. I am surprised to hear that comment, because I think the premise is absolutely wrong.

The purpose of regulation is to benefit the public and give the public the assurances it needs as to qualities and standards. It in no way protects the product, if you consider the product an invention, and the investment that went into making that invention.

It also presupposes that the information, say, my company submits is to be made available to other companies for the registration and certification of their products.

To this extent it is a demotivating influence on investments. In fact, I wonder what foolish invester under these circumstances would, indeed, make a similar investment.

The patent system, on the other hand, constitutionally based—although let's pass the philosophical implications of that—is designed specifically to protect the inventor, first, and, second, to encourage the investment in inventive efforts. In return for this he gets his patent with the prerogatives it carries.

I do not really see any relationship between the granting of approval to market and the granting of a patent under a patent system.

Mr. RADER. Mr. Virden, you mentioned in your testimony that procurement contracts often carry an agreement with the Government that the information submitted will be held confidential. Those agreements have often been challenged by other witnesses who say that the Government will enter into those agreements just to avoid a disclosure fight.

How would you advise the subcommittee to resolve this conflict between honoring these agreements and the Government perhaps abusing them?

Mr. VIRDEN. The agreements I am referring to primarily are those agreements which we enter into using Government legends. There is an implied agreement that the information we submit with our technical, cost, and management proposals will not be released outside the Government and is specifically for evaluation purposes. In other words, that is the purpose—to give the Government sufficient information to decide which potential contractor will obtain the contract or in the case of an unsolicited proposal whether the idea has sufficient merit in order to permit contract award.

Those legends, or agreements, have been specifically changed to say that they are subject to the Freedom of Information Act.

We view the agreements that we have, despite the court decisions, as being helpful. In my view, they are something that the Government would really like to have without the imposition of the Freedom of Information Act.

In other words, the Government is anxious to get our innovative ideas. They are anxious for us to be able to give them the state-of-the-art approaches to the solutions of their problems.

I think in the procurement process that the Government does want to honor these agreements. Were it not for the situation with the substantial competitive harm test, you would not have this problem.

Mr. RADER. Dr. Bondurant, is it correct that the scientific research done at nonprofit institutions would be protected by the words "proprietary information" within the standards of S. 1247?

Dr. BONDURANT. I do not think I am qualified to answer the question. It seems to me it is a question of law.

As I understand it, the question is at best ambiguously answered on the basis of the decision in the *Washington Research Project, Inc.* which denied that research grant applications had commercial or other value.

On that basis, I am not sure that the term "proprietary," unless specifically designated to cover research grants or unless the record some other way shows that would carry.

May I ask Mr. Keyes to comment on this question, as counsel to the Association of American Medical Colleges and a person knowledgeable in this area?

Mr. RADER. Yes; and could I add one aspect to the question as you answer it.

Is "proprietary information" broad enough to cover your problem of doing research under Government grants, given the fact that we may not know the marketability of the idea at the time you make the submission, returning again to the example given us by Mr. Braverman earlier in the day.

Is "proprietary" broad enough to cover the instance when we do not know its marketability?

Dr. BONDURANT. May I just offer an observation for Mr. Keyes' elaboration.

It seems to us that it would be better to identify research grants and research grant applications as a specific category, thereby avoiding any implication of ambiguity in the matter.

There may, however, be other reasons not to do that.

Mr. KEYES. I concur with everything Dr. Bondurant has said.

We believe that the current situation is somewhat ambiguous. We do not want to imply that there is no way that our situation could be brought within the scope of either the existing exemption 4 or the language proposed in S. 1247. The situation in the *Washington Research Project* did not actually involve a showing of a commercial interest on the part of the scientists who had submitted the grant applications. Consequently, the issue was not really resolved in a particular case where evidence of a commercial interest was presented.

The court, however, simply said that noncommercial scientists simply have no commercial interest in this information.

I think as Dr. Bondurant pointed out in his comments and as elaborated on in the statement submitted for the record, it is clear that noncommercial scientists in today's situation, and the institutions and universities, do have commercial interests that need to be protected.

Even more fundamental, in terms of public interest considerations, is that the dynamics of the process of innovation and technology transfer require the maintenance of confidentiality of the same information until the interest can mature and can be protected under the patent process.

The patent application, as you referred to earlier, is an interesting situation. There is a disclosure there, but it is at the time of the granting of the patent where the rights are defined and protected.

Before that situation arises, if there is a disclosure, you may be forever precluded from receiving a patent under foreign patent systems. If there is a disclosure in this country, more than 1 year of the submission of the patent application, you will be prohibited or precluded from receiving your patent.

Given the necessity and the importance of the patents in the technology transfer process, maintenance of the confidentiality of the sensitive information is absolutely essential for all of the steps in our system to work.

Again, we would not say that there is no way that we could be covered, but the *Washington Research Project* case certainly throws a cloud on the matter, which ought to be cleared up as we are dealing with these issues.

Mr. RADER. Thank you.

[The prepared statement of Dr. Bondurant follows:]

Prepared Statement of Stuart Bondurant

This statement presents the views of the Association of American Medical Colleges, the American Council on Education, and the Council on Governmental Relations on the current operation of the Freedom of Information Act. It will identify some of the problems and issues that appear important to these higher education associations and suggest ways to improve the operation of the Freedom of Information Act to accommodate these concerns.

In general this critique is from the perspective of submitters of information to the government for the purpose of participating in federal government grants and contracts programs. More particularly, it will focus on the experience of a scientist engaged in grant-and-contract-supported research funded primarily by the National Institutes of Health. This perspective is shared by the organizations that have collaborated in the development of this testimony; their endorsement of it reflects views widely shared within the academic community.

The purpose of governmental support for research is to accomplish a public objective. The ultimate objective of biomedical research is the expansion of knowledge relating to the causes of the diseases, to create a scientific base for the ultimate alleviation of these diseases. Many Congressional Committees, the last four Administrations and the general public have all been preoccupied with the need for government actions to enhance the speed at which research findings are exploited in practice for the benefit of the public at large. These remarks have particular relevance to the concerns being expressed in this area.

Public Law 96-517, "The Patent and Trademark Amendments of 1980" was the result of substantial Congressional interest in finding the best means to enhance the utilization of the results of Government funded research. The Act abolishes approximately 26 conflicting statutory and administrative policies governing the

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right to title in inventions made in the performances of government grants and contracts giving universities, other not for profit organizations and small businesses a first right of refusal to title in such inventions. Based on fiscal year 1980's rate of federal funding of research and development conducted by such organizations, the Act covers the disposition of the invention results from approximately five billion dollars of grant and contract awards to universities and non-profits representing 65% of the total cost of all basic research conducted in the United States.

Appreciation of the importance of this effort to initiate a significant increase in the commercialization of inventions resulting from government requires an understanding of the role of patents in the technology transfer process. In many cases, exclusive rights in the marketing of the resultant product is a necessary incentive for commercial enterprises to invest the development capital usually required to transform research findings to practical usage. The mechanism for providing this commercial incentive is through the patent and licensing system. In the absence of patent, the organization devoting its resources to the development of an invention stands in no different relationship to the product than its competitors. That is, its competitors, having invested little or nothing, can market the product in direct competition with its developer. The outcome, rather than being the public availability of a product unencumbered by the expense of royalty payments--often cited as the most desirable disposition of the results of government funded research--is often no marketable product because no one has the incentive to devote the necessary resources to bring this about.

This dynamic was observed by the General Accounting Office in a 1968 study of the HEW Patent Policy (Report to the Congress, Problem Areas Affecting Usefulness of Government-Sponsored Research in Medicinal Chemistry, B-164031(2) NIH, DHEW, By the Controller General of the United States, August 12, 1968.) As a result of

the GAO recommendations, the HEW Patent Policy was revised to permit grantee institutions to acquire patent rights and the ability to award exclusive licenses, in appropriate cases, to inventions springing from research conducted with HEW funds. This change in policy has been demonstrably effective in bringing research findings to the level of public benefit, far more so in fact than the policies of other agencies and departments of the federal government. The Patent and Trademark Amendments of 1980 adopted this approach as government wide policy, abolishing the maze of conflicting approaches.

The relevance of this discussion of patents to the Freedom of Information Act becomes apparent with the addition of several additional items of information. First, material contained in research grant applications and progress reports submitted by investigators may contain the essential ingredients of a potentially patentable innovation. Second, disclosure of this material may forever preclude the acquisition of a patent. Third, submitters of such material are currently without an enforceable right under the Freedom of Information Act to prevent disclosure.

While there has been substantial fear that information submitted by individual investigators in support of their research project proposals would be released on a wholesale scale and would thereby have a devastating effect on the conduct of science and the application of that science to bringing new modalities of treatment and advances in drug therapy to the marketplace, this outcome has not, insofar as I have been able to determine, materialized. Our fears however, were not groundless. Moreover, they were exacerbated by the decision of the U.S. Court of Appeals in the District of Columbia in Washington Research Project, Inc. v. Department of Health, Education and Welfare, (504 F.2d 238 (D.C. Cir., 1974)). The Court dismissed the applicability of Exemption Four of the Freedom of

Information Act to the activities of academic scientists with the offhand assertion that academicians are not engaged in commerce.

> "It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that a scientist is engaged in trade or commerce."

The widely publicized application of recombinant DNA technology to the development of important products of great utility in both medicine and agriculture belies any denigration of the commercial importance of academic research. Another court considering the same issue today might very well arrive at a different conclusion regarding the potential commercial interest of academic scientists.

The National Institutes of Health, in the subsequent implementation of the Freedom of Information Act, have read the decision narrowly: that the specific grant applications requested by Washington Research Project were ones for which no specific showing of the commercial interest of the scientist had been demonstrated. Thus, administrators at the NIH responded to requests for information contained in research proposals by conferring with the submitter of the information and making an independent assessment as to whether or not the material requested contained information of potentially commercial value. This accommodation at NIH has given minimum protection to the submitter of information.

Our concerns relate to the uncertainty of the current situation. The Washington Research Project case casts a cloud over the legitimacy of interests that academic scientists seek to protect. Furthermore, Chrysler v. Brown (441 U.S. 281, 1979) highlights the absence of procedures under the FOIA to protect the interests of submitters of information; in this case, the Supreme Court defined the Freedom of Information Act as an information disclosure statute and specified that the procedures provided therein are solely for the benefit of the requestor of information. In other words, no procedures are now defined under which

submitters of information may protect their interests in the material submitted. Furthermore, the Chrysler case determined that invocation of Exemption Four, the so-called trade secret exemption, is entirely at the discretion of the government. Consequently, even if it were possible for the submitters of information to bring themselves within the ambit of Exemption Four, the government would be under no obligation to respect the interest of those submitters.

While the availability of procedures under the Administrative Procedures Act are alluded to in the decision, these protections do not appear to us to be adequate. The issue in any court challenge of an administrative determination is whether or not the agency head abused its discretion in the matter. Such a standard, with all of the presumptions on the side of the federal agency making the determination, do not appear to give sufficient weight to the interests of the submitter of information.

The concerns of the academic community with the FOIA are twofold: first, the definition of what should be exempt from mandatory disclosure; and second, the establishment by statute of procedures by which submitters of information may assert their rights in the confidentiality of information.

Legislation should specifically recognize the commercial or potential commercial interest in the work of academic scientists and the need for protecting the confidentiality of the information until the proper steps have been taken to encourage and initiate the commercial development and widespread public application of the research. While U.S. patent laws disallow a patent application if publication of the innovation or finding has been made more than one year prior to the patent application, foreign patent systems disallow patenting if there has been any publication of the innovation in advance of the patent application. Court decisions have given a very expansive meaning of the term publication in

this context, finding for example, that the availability of a master's dissertation on a library shelf constitutes "publication" even though there was no showing that anyone had ever read the document.

Procedures must be established to protect the rights of the submitters of information. At a minimum, legislation should meet a number of requirements:

- The submitters of information should be notified that their information has been requested.
- Submitters should be provided a defined time in order to assert that the disclosure of the information would damage their rights or the rights that they are in a position to represent (the academic institution which is the formal grant recipient).
- Agencies should be required to give formal consideration to the claims of the submitter who objects to the release of the information.
- A provision for de novo judicial review should be enacted, that is, judicial review should not be limited to a review of the record developed by the agency which has made the determination.
- Finally, the statute should explicitly require an agency to maintain as confidential defined information unless there is an overriding public purpose to be served by its disclosure.

S. 1247 introduced by Senator Dole and others goes a long way toward meeting our concerns. However, it does not appear to fully meet our needs. Of critical importance is the definition of "private source" submitters of information. Section 2 of the bill, inserting a new paragraph (7)(A)(i) in Section 552 (a) of Title 5, United States Code, defines private source as "any person...who is not an...employee of a State or local government." While in some cases colleges or universities are entities separated from state government by operation of the

state constitution (e.g., Michigan and California) most public university faculty members are generally regarded as governmental employees. Consequently, the operation of the FOIA under this provision would make inappropriate distinctions among investigators based upon the status of their employer. We do not believe that this would serve the purpose sought to be achieved by this act.

Secondly, this same paragraph refers to "information not already in the public domain" as the subject matter of the remainder of the provision of the bill. This calls for a threshold determination on the part of the agency, but there is no requirement that the agency in making this determination consult with the submitter. We suggest the provision be strengthened by a requirement for such consultation in order to prevent erroneous determinations by the agency that information is in the public domain when such is not the case. After the fact recognition of an error would not generally permit any effective rectification. Alternatively, the statute might provide an opportunity for submitters to identify in the submission particular material which is regarded as exempt from disclosure, with a requirement that the agency make no contrary determination without such consultation.

Finally, we have concerns with respect to the proposed new language of Exemption Four. Clause (C) "Proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained," does not appear to directly resolve the uncertain applicability of the exemption to university based research materials. We would therefore urge that the language be modified to clarify this situation. For example, a new clause might be added: "(E) information submitted in connection with an application for government funding of a research project which may result in a commercially valuable innovation." A less desirable alternative would be for the committee report to

specify its intent regarding this interpretation. Clause (D) "Information which the agency in good faith has obligated itself not to disclose," appears not to effect a resolution of this issue. It leaves the matter to agency discretion to so obligate itself but, perhaps more fundamentally, creates additional uncertainties with respect to an agency's authority to obligate itself to withhold information not otherwise exempt from disclosure under the Act. We perceive this to be a dangerous and highly unreliable approach to the resolution of our concerns.

In conclusion, we applaud the interest of this committee in seeking a solution to important problems which have been revealed by the operation of the FOIA. We hope that the committee will conscientiously consider the needs of the research community and the importance of the patent system to the achievement of significant public policy objectives as it continues its deliberations. S. 1247 offers great promise for resolving our concerns, but it does not appear to fully accomplish this in its current form. We would be happy to be of assistance in any way you might choose as you proceed with your work.

Mr. RADER. One final question on that *Washington Research* case.

What effect would it have on research by Government grantees?

Dr. BONDURANT. This is another example, I think. It is sort of like Sherlock Holmes and the barking dog. We do not hear the dogs barking.

I cannot cite specific examples of a chilling or inhibiting effect of that or the consequences thereof. On the other hand, the information was widely circulated throughout the community. It comes at a time of great interest and emphasis on the commercial application of research advances by universities and their faculties. That is supported by Congress in many way.

There is no question that research grant applications are now being written against the background of the knowledge of that decision.

Beyond that, I cannot cite specific examples.

Mr. KEYES. If I could elaborate just briefly on that.

Mr. RADER. Please do.

Mr. KEYES. One reason why we are unable to cite specific examples—and I think we are very grateful that we are not—is because of the sensitive handling of the information by the employees and the administrators of the National Institutes of Health who have undertaken, more or less voluntarily, to notify the submitter of the information and to conduct this investigation if there is an objection to its release.

Our concern is that this process is not embedded in statute and there is no basis for submitters to enforce that process.

We are very concerned that a new symmetry be infused back into the law where the rights of the submitter receive equal treatment and have equal dignity with the rights of the requester of the information.

Mr. RADER. Thank you.

Mr. WHALE. Might I just make a brief comment?

Mr. RADER. Please do.

Mr. WHALE. I think the underlying thesis of the *Washington Research* case is further undermined by the flight of scientists and academicians from the universities setting up their own small companies in the recombinant DNA area.

Mr. RADER. Thank you. S. 1247 contains both procedural and substantive revisions to protect information covered by exemption 4. Our previous panel seemed to be most concerned with the substantive changes in exemption 4.

Would your confidential information, Mr. Whale and Mr. Virden, be adequately protected if only the procedural rights were strengthened by S. 1247 without changing the standard of the fourth exemption?

Mr. WHALE. They would certainly be protected to a large degree.

I would hold great stock, however, in the changing of the test which I take to be a substantive aspect of the bill because of the virtual impossibility of the fair assessment of the test as presented now in the cases.

I would suggest that with the safety valve that Mr. Pulley referred to, the opportunity for the consumer groups to pursue infor-

mation on a showing of legitimate clear and convincing need, the problems of both groups would seem to be adequately served.

The need for addressing the problems of the submitters of information, I think, has been made clear by the imbalances that now exist and by the demonstration of the overwhelming use of FOIA by requester groups not associated with the consumer interests.

Mr. RADER. Mr. Virden, could you comment on whether the procedural changes alone would protect your vitally sensitive information?

Mr. VIRDEN. I agree—they would be very helpful. I certainly believe that the key provision that we are seeking is to change the substantial competitive harm test and get us into a commerical situation, especially where we are dealing with the Government in the procurement process. In effect, it is a business type of relationship and we should return to the understanding of what trade secrets are all about in the commercial context.

In that regard, I would like to cite a portion of a Supreme Court case, *Kewanee Oil Co.* v. *Bicron Corp.:*

> Maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. The necessity of good faith and honest fair dealing is the very life and spirit of the commercial world.

When we return to honoring expectations and when we have a test that keeps trade secrets in the Government, where they would customarily be kept in the commercial world, this is a very, very important substantive change and one which we really need in order to protect our trade secrets adequately. We do need that.

Mr. RADER. Thank you, Mr. Virden.

Finally, Mr. Vladeck mentioned that 18 U.S.C. 1905 provides a criminal penalty for disclosure of trade secrets. Are any of you aware of anyone being prosecuted thereunder for a Freedom of Information Act disclosure?

Mr. KEYES. Mr. Rader, it is my understanding that no one in history has ever been prosecuted for release of information under 1905. That may not be correct, but it is my understanding of the situation.

Furthermore, and more importantly, the improbability of that being a substantial disincentive at the present time is illustrated by the fact that the U.S. attorney's manual contains in it a provision which resulted from a Justice Department determination in 1979 which suspended the use of 1905 unless there has been a central Justice Department approval for the action.

Again, my information is that there has never been a Justice Department approval for such an action.

I think that the reality is that 1905 is no inhibition whatsoever to the release of information.

Mr. RADER. Mr. Whale, you had a comment.

Mr. WHALE. I would certainly agree. It is my independent understanding that there has been no action under that statute.

After all, when that statute is invoked, the secret is already out.

What you are doing by invoking the statute is lashing a Federal employee from whom any kind of retribution is in no sense recompense for what has been lost.

Mr. RADER. Do any of you gentlemen have any final comments here?

Mr. VIRDEN. I would like to comment on 18 U.S.C. 1905.

In submitting documents in the procurement process, where there are trade secrets and confidential business information, we put a stamp on the data.

We not only reference that it is not to be disclosed pursuant to exemption B(4) of the Freedom of Information Act, but we also in our legends indicate that it is not to be disclosed outside the Government pursuant to 18 U.S.C. 1905.

We find this helpful. We also find it brings attention to the importance of the document to our company.

We find it helpful when we are responding and working with the agency with respect to requests for data which includes our confidential business information that there is very good language in 18 U.S.C. 1905 as to what cannot be released: "trade secrets, processes, operations, style of work or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association."

It is very helpful language. We tend to use that, as much of the information we are concerned about having released falls within the language of 18 U.S.C. 1905.

Mr. RADER. Gentlemen, we certainly appreciate the expertise you have brought to the subcommittee on the subject of business confidentiality.

Thank you all very much.

The subcommittee will be meeting again on July 31 to continue its hearings on the Freedom of Information Act.

Until then, we will stand adjourned.

Thank you.

[Whereupon, at 11:50 a.m., the subcommittee recessed, to reconvene on July 31, 1981.]

FREEDOM OF INFORMATION ACT

FRIDAY, JULY 31, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:40 a.m., in room 5110, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch and DeConcini.

Staff present: Randall Rader, counsel; Steve Markman, general counsel; Peter Ormsby, professional staff assistant; Dickson Burton, law clerk; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The committee will come to order.

I apologize for being late, but I had one interview on top of another this morning and just could not get them completed.

Today we convene the third in a series of hearings on the Freedom of Information Act.

In the first two hearings, we have taken testimony that has reaffirmed my belief in the need for a strong Freedom of Information Act. A democratic society needs an informed public to hold Government accountable for its actions. However, we have not yet reached a proper balance between an open Government and performance of certain essential governmental functions.

Last week, we examined the fourth exemption of the Freedom of Information Act which Congress originally created to protect trade secrets and confidential business information.

The judicially created competitive harm standard leaves bureaucrats and judges to determine the market value of confidential information that might be of critical importance to a private businessman.

Moreover, the Freedom of Information Act does not require that notice be given to submitters of information before their information is released to third parties, leaving submitters with no procedural remedies to adequately protect their secrets.

Our foreign intelligence capabilities have been significantly impaired as a result of the Freedom of Information Act. Foreign sources are more reluctant to supply critical information to our intelligence officers because of a widespread belief that the U.S. Government cannot protect its secrets.

Additionally, the Central Intelligence Agency and other agencies are required to respond to requests from foreign nationals and governments, including the KGB, the same as they would respond to requests from American citizens.

On September 16, we will be hearing testimony from the Central Intelligence Agency and others regarding the national security implications of the Freedom of Information Act.

Today we will be focusing on another critical area that needs close scrutiny by the subcommittee.

In 1978 the Subcommittee on Criminal Laws and Procedures, of which I was a member, held hearings on the erosion of law enforcement intelligence. As a part of those hearings, we looked at the Freedom of Information Act.

In the report on the hearings, the subcommittee concluded the following:

> The sponsors of FOIA wanted to reinforce the right to know. It can safely be said that none of them foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization that would be made of the act by organized crime and other criminal elements or the damage it would do to the personal security of individual citizens.

Among other things, certain law enforcement investigative and training manuals are subject to FOIA requests, as are some investigative personnel rosters.

The Freedom of Information Act has inhibited the sharing of law enforcement intelligence between State and local government agencies and Federal law enforcement agencies.

Informants are much more reluctant to cooperate with Government investigators, giving no small relief to organized crime.

According to the 1978 subcommittee report, the FBI had close to 1,100 informants in 1975 monitoring the activities of terrorists and extremist groups, both far left and far right. By July 1978, there were only 42 such informants nationwide. To drop from 1,100 to 42 in just a few years is startling to me.

As a result, in September 1978, Attorney General Griffin Bell suggested amending FOIA to exempt criminal investigative records from disclosure for a period of 10 years to correct the damage done to the informant program.

The FBI concluded the 10-year moratorium on investigative records in its proposals for amending FOIA which Director Webster submitted last year.

It is also a part of S. 587 which I introduced and which the subcommittee will examine during the course of these hearings.

Again, what I want to emphasize is that we need the Freedom of Information Act, and we need it to be strong and effective. Its very worthy and legitimate objectives—more openness in Government and more freedom to find out disclosures—must be carefully balanced with equally legitimate Government functions that protect the personal security of the citizens of this country.

Prof. Charles Rice of the Notre Dame Law School described the challenge before us:

> What is necessary now is not a dismantling of these statutes but rather corrective surgery to bring them more into line with their original and laudable purpose.

Senator DeConcini, we are very happy to have you here. We would be happy to take your statement at this time.

STATEMENT OF DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, I want to begin by commending you for holding this important hearing. You have already had some other hearings on the Freedom of Information Act. I really appreciate the commitment that you have demonstrated.

The issues which affect the Secret Service are of great importance to all of us.

I also want to express my personal gratitude to Senator Denton and to you, again, for your leadership and cooperation in agreeing jointly to move S. 1394, the Secret Service Reform Act of 1981, through the committee review process in such a prompt fashion, along with your oversight hearings on the Freedom of Information Act.

Your efforts in support of this legislation are deeply appreciated by this Senator.

Mr. Chairman, I will not spend much of the committee's time in going over the various provisions of S. 1394. The intent is crystal clear.

It is designed to provide the Secret Service with an exemption to the Freedom of Information Act and to provide other statutory changes to better enable the Secret Service to protect the President of the United States and other protectees under law from potentially dangerous or terrorist groups or individuals.

It also makes certain provisions to improve the criminal investigative functions at the Secret Service without usurping the authority of other law enforcement agencies.

Obviously, a focus of today's hearings will be on the impact of the Freedom of Information Act on Secret Service operations. However, I hope that we can touch briefly on other provisions contained in S. 1394.

I want to welcome Mr. Burke and thank him for pinch hitting for the Director, Stuart Knight, who I understand is on the Secret Service disabled list with a bad back and could not be with us today.

We wish him a speedy recovery.

Anyone who witnessed the tremendous courage of the agents involved in the March 30 incident at the Hilton and anyone who saw, as I did, the outstanding group of agents training hard at the Beltsville, Md., training facility knows what a fine organization you have and of which you are a part.

We are grateful for that leadership and for the restraint that has been imposed by the leadership on your agents and by the professionalism exhibited by your agency.

I think that Congress is now attempting to find a resolution that will help you do your job and make it a little easier and at the same time protect the citizens of this country.

I thank you, Mr. Chairman, once again, for your step forward in this oversight of the Freedom of Information Act and certainly for considering this as a hearing for S. 1394.

Senator HATCH. Thank you, Senator. We appreciate your leadership in this area.

I personally appreciate working with you on this subcommittee.

Our first witness today was, of course, going to be, as Senator DeConcini stated, Stuart Knight, Director of the U.S. Secret Service.

Unfortunately, he was recently injured and suffered a very painful and incapacitating back injury. He will, hopefully, be up and around in a few days but was unable to be with us this morning.

To present his testimony, he has sent Robert R. Burke, Assistant Director of Investigation for the Secret Service.

Please convey my wishes for a speedy recovery to Mr. Knight if you will, Mr. Burke.

Mr. Burke graduated from Loyola of Chicago and received his master's at Indiana University.

He was an officer in the U.S. Army.

While with the Secret Service, he has received the Treasury Department Meritorious Service Award and the Career Education Award.

Presently, 65 percent of the protective agents of the Secret Service are under his direction and jurisdiction.

Before you begin, Mr. Burke, I would like to advise you and all the other witnesses that your entire written statement will be included in the record of these proceedings.

To the extent that you and other witnesses can make your oral statements concise, it will allow us more time for questions. We hope that you will keep that in mind and make your statement as concise as possible.

The record will be built by not only your oral statement but your written statement as well.

It is nice to have you with us, and you may proceed in any way you wish.

STATEMENT OF ROBERT R. BURKE, ASSISTANT DIRECTOR FOR INVESTIGATIONS, U.S. SECRET SERVICE

Mr. BURKE. Thank you, Mr. Chairman.

I am pleased to appear today before your committee.

As you know, Mr. Chairman, the Secret Service protects the President of the United States, the Vice President, and visiting foreign heads of state and government. The Secret Service also has the responsibility of protecting major candidates for the office of the President and Vice President of the United States.

In addition, the Secret Service has major criminal responsibilities involving threats against the President and counterfeiting and forgery of U.S. Government obligations.

The Secret Service obtains information from the law enforcement community on individuals and groups who may pose a threat to the safety of the President. The Warren Commission, after the assassination of President Kennedy, recommended that the Secret Service intensify its efforts to identify persons who threaten the safety of the President. The Warren Commission also recommended that other Federal agencies furnish intelligence information to the Secret Service.

Over the years, the Secret Service has received substantial amounts of information from the law enforcement community. In recent times, however, the quantity and the quality of the informa-

tion has declined. We believe this came about, in part, as a result of the Freedom of Information Act.

The Freedom of Information Act has contributed to establishing a climate which has adversely affected our ability to perform our protective and criminal investigative missions. The Secret Service is meeting with increasing difficulty in obtaining information essential to our protective and investigative efforts.

Mr. Chairman, we work very closely with State and local law enforcement on protection and criminal investigations through our network of 64 field offices and 40 resident agencies. We have learned that there is a definite reluctance on the part of State and local law enforcement to provide Federal law enforcement with essential intelligence information. This is because these State and local law enforcement people doubt the ability of Federal law enforcement officers to maintain the confidentiality of the information under the Freedom of Information Act. They are fearful of compromising informants and revealing their investigative interests prematurely.

In addition, State and local law enforcement has greatly curtailed or ceased altogether their activities in the collection of intelligence on individuals and groups.

This is due, in part, to the restrictive climate regarding intelligence activities and their own local freedom of information restrictions.

I hasten to add, however, in the category of protection, that State and local law enforcement are cooperative and willing to assist the Secret Service. However, in the area of intelligence, they cannot give us what they no longer have.

Law enforcement depends to a great degree on confidential informants, and the Secret Service is no exception. Informants are increasingly reluctant to come forward because they are fearful their identities will be revealed.

Convicted felons and persons we believe are involved with criminal activities make Freedom of Information Act requests to several different law enforcement agencies. Through a careful sifting of the responses, they may discern the very information sources that the law enforcement agencies wish to protect.

A reviewer in the exhaustive line-by-line examination of material available for release under the act can make a mistake which can result in revelations damaging to the integrity of our procedures and to sources of information.

We believe that ordinary citizens are increasingly reluctant to come forward with information, because they fear their confidentiality will be compromised.

The Secret Service travels overseas with our protectees. An essential part of our overseas protection activities is the liaison between the Secret Service and foreign law enforcement agencies. These law enforcement officers, on an operational level in other countries, express great reluctance in supplying us with protective and criminal intelligence information because they doubt the ability of U.S. agencies to maintain the confidentiality of information.

Director Knight of the Secret Service is a former vice president of Interpol and a member of the executive committee. He has been

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told by senior foreign law enforcement officials that they doubt the U.S. agencies' ability to maintain confidentiality.

In the protective area, it is important to note that the Secret Service is a recipient of information, as differentiated from the U.S. intelligence agencies which gather information. Intelligence information on individuals and groups is absolutely necessary for us to perform our protective role. The decrease in the quality and quantity of this information has forced us into a more reactive posture than we would like.

Without adequate information on individuals and groups, we are less able to predict where to apply our limited resources. We, therefore, have to use more agents, more State and local police officers, and more equipment—without the focus on what may be the real danger areas.

Mr. Chairman, earlier today I was asked if I would comment on S. 1394 and its effect on the Secret Service from the Freedom of Information Act standpoint and its effect on protection generally.

Shall I do that now?

Senator HATCH. Yes, sir.

FOIA EXEMPTION FOR THE SECRET SERVICE

Mr. BURKE. Thank you, Mr. Chairman.

In S. 1394, Senator DeConcini has introduced legislation which, in addition to enhancing our protective and criminal responsibilities, provides exemptions for the Secret Service under the Freedom of Information Act.

This legislation is more in concert with the exemption given the Secret Service by the Congress under the Privacy Act and the special access given us under the Financial Right to Privacy Act.

The bill enables the Secret Service to, first, assure the law enforcement community, both in the United States and abroad, that the information which they supply to the Secret Service for protective purposes will remain confidential.

This is important—both from the practical standpoint of enabling the Secret Service to better fulfill its functions by not disclosing potentially significant security information and in the abstract, by conveying the message that the Secret Service has the ability to control the dissemination of its records containing sensitive information.

ASSISTANCE TO PROTECTION

Second, Senator DeConcini's bill would enable us to respond directly to some of our more pressing protective security problems. Specifically, it would enable us to investigate and recommend prosecution of any individual threatening our protectees, as well as anyone who intentionally intrudes into a protective security area established to assure the safety of these protectees.

At the present time, we must frequently defer to State laws in these cases. As a result, we find prosecution impossible in certain situations.

Legislation would also permit the Secret Service to better utilize its protective resources by limiting our protective responsibilities for former First Ladies and other protectees for whom full-time

Secret Service protection is no longer necessary. This can be done, in our judgment, without jeopardizing the safety of any of these individuals for whom protection could then be authorized in response to a particular need.

Third, and finally, it would enhance our protective functions by providing a more fertile base of investigative responsibilities for the Secret Service.

SECRET SERVICE INVESTIGATIVE RESPONSIBILITIES

By maintaining an investigative foundation, such as anticipated by this bill, on a national basis, the Secret Service will be able to provide challenging careers to highly qualified individuals, keep them in the employ of the Secret Service, and thereby support the nationwide effort of the Secret Service to meet its primary responsibility in providing protection to the President and others.

Thank you.

Senator HATCH. Thank you for your testimony.

I remember when Stuart Knight testified back in 1978. I was the Senator taking the testimony at that time.

He indicated that he had recommended that the President not go to at least two cities in this country. Has that condition changed or is it the same?

Mr. BURKE. The situation is very similar, Mr. Chairman, in that with the change in the intelligence climate, the Secret Service does not know as much about local conditions as it used to. This is due, in part, to the Freedom of Information Act and its chilling effect on State and local agencies.

Our dilemma is that when we have a security incident, it is much more difficult for us to resolve the incident. It is more difficult for us to evaluate the threat.

In some circumstances, since we have been unable to evaluate the threat, we have in the past recommended to the President that he not travel to a particular city.

Senator HATCH. Would you still stand with the statement he made then that there are at least two cities, or are there more than two now?

Mr. BURKE. It would be difficult for me to characterize that for you, Mr. Chairman.

The situation is ever-changing. It can change for example, with a significant foreign incident.

Senator HATCH. Is it changing for the better or for the worse?

Mr. BURKE. I think it is changing for the worse, sir.

Senator HATCH. You indicate that there may be more than two cities within this country that the President probably should not visit.

Mr. BURKE. That is entirely possible, sir, connected with some particular incident that we may not be able to resolve.

Senator HATCH. Let me ask you this.

He indicated, as you have indicated in your short remarks here today, that the informant testimony has basically just dried up throughout the country. Therefore, you have nowhere near the ability you used to have before the Freedom of Information Act and the Privacy Act to be able to go into an area and really check

it out in advance to determine just what potential difficulties might exist.

Mr. BURKE. That is true, Mr. Chairman.

It is our experience that informants are afraid to come forward; they are afraid of exposure.

Senator HATCH. Assistant Attorney General Jonathan Rose testified earlier in our hearings that the FBI and DEA have reported a large number of incidents in which potential informants have cited FOIA as their reason for declining to cooperate with the Government.

Would your report be similar?

Mr. BURKE. Yes, sir, I think it would be.

Senator HATCH. S. 1394, the Secret Service Reform Act, would expand your jurisdiction for law enforcement purposes. Why when the Secret Service is apparently overworked already do you want expanded jurisdiction?

Mr. BURKE. First, Mr. Chairman, the Secret Service depends very heavily on the field offices that are spread throughout the Nation. Those offices provide the local intelligence information and the local knowledge for protective trips of the President and others. Those field offices provide the basic contacts with the local law enforcement that provide entree.

We do not have that "man from Washington" syndrome. We have people who are familiar with the ground. For our protective effort we must have these field offices.

We do a good job as investigators. Last year, only $5.6 million in counterfeit money was passed on the public. We seized approximately $55 million before it could be passed on the public.

The types of people that are attracted to the Secret Service are people that join for a career in law enforcement. They are interested in being criminal investigators.

We feel that the expanded jurisdiction provided by the DeConcini bill will attract these individuals and also will not materially increase our workload, because we will prioritize our investigations in such a fashion that we will be able to maintain the same number of active cases.

Finally, the impact of electronic funds transfer and direct deposit in the short run has not been great on the Secret Service in the area of check forgery. In the long run, it will be significant. As funds are transferred by electronic means, rather than by the paper Treasury check, we see a definite decrease in Treasury checks. Some of the responsibilities provided by the DeConcini bill will backfill in these areas.

ASSASSINATION ATTEMPT ON PRESIDENT REAGAN

Senator HATCH. Everyone is alarmed at the recent assassination attempt on President Reagan, of course. To what extent did the problems with the Freedom of Information Act which you have outlined contribute to the occurrence of that unfortunate incident?

Mr. BURKE. Mr. Chairman, the difficulty with that question is, of course, that we do not know what might have been developed and what information might have been brought forward. It is very difficult to quantify a negative.

Had the restrictions on intelligence not existed, had informants not been reluctant to come forward, and had police departments been more forthcoming—all of these factors are unknown.

I do not know what its effect has been in this particular incident.

RESTRICTIONS ON LAW ENFORCEMENT INFORMATION FLOW

Senator HATCH. You have mentioned that other Federal law enforcement agencies are reluctant to share information and intelligence with your agency. All Federal agencies in turn receive information from State and local government agencies. To what extent has FOIA restricted this flow of information and intelligence among State, local, and Federal law enforcement agencies. Specifically, how many States send criminal information to you or to the National Criminal Information Center at the FBI?

Mr. BURKE. The effect, Mr. Chairman, on State and local agencies and on the Federal agencies, I believe, is different.

From the standpoint of the Federal agencies, I am absolutely confident that we get everything they have. The question is that they do not have as much as they used to. There has been a very significant decrease in quality and quantity.

With regard to the State and local agencies, I believe there is a problem.

Possibly by giving you an example that will illustrate it. I must give it to you in very general terms, because of some security considerations which are still ongoing.

As a result of a pending FOIA court case, a police department has informed this Service that release of information will jeopardize sensitive sources.

They have told us, and I cannot really elaborate here, although I will in executive session if you wish, that they will not provide us with any more information. They are giving us a flat moratorium on future information.

I think the State and local law enforcement officials definitely have very serious concerns about the ability of the Federal Government to maintain the confidentiality of informants and also to reveal their case interest prematurely.

As a result, they are very reluctant to give information.

If they for example, have some direct information on the assassination attempt that might be made on the President—I have no doubt that they will come forward.

Intelligence is an incremental thing. What may be seemingly insignificant today can be quite significant tomorrow when the two items of information are connected.

I feel that we may suffer a very significant decrease in this type of information from State and local law enforcement.

With regard to the NCIC of the FBI, I think most States contribute to the NCIC wanted persons file. Only seven, to my knowledge, contribute to the criminal history file of the FBI's NCIC network.

As far as the Secret Service is concerned, using our 64 field offices——

Senator HATCH. Did you say only eight States contribute to the NCIC?

Mr. BURKE. No, sir. I think most of the States do. I do not know the exact number, but I could provide that for the record.

Only seven, I believe, contribute to the other aspect of it, which is the combined criminal histories, where you can check in with the FBI and get the criminal history on a known and wanted individual.

As far as the Secret Service is concerned, we have 64 field offices and 40 resident agencies. These field offices and resident agencies maintain a continuing contact with the State and local police. They are constantly attempting to develop information which would be of protective interest to us.

That information, in turn, is funneled to our Washington Intelligence Division where it is compiled, analyzed, and provided to all our offices and protective divisions.

FOIA REQUESTS FROM FOREIGN SOURCES

Senator HATCH. Does your agency receive requests from foreign nationals or foreign agencies, and are they treated differently from requests by U.S. citizens?

Mr. BURKE. Mr. Chairman, we can treat requests from foreign nationals no differently than requests from U.S. citizens. The Secret Service does receive such requests.

Senator HATCH. In other words, even though they may be people whose interests are contrary to the best interests of the United States, you have no choice other than to comply?

Mr. BURKE. That is correct, sir.

Senator HATCH. Is it in the best interest of the United States to treat foreign nationals the same as U.S. citizens in answering FOIA requests?

Mr. BURKE. Mr. Chairman, I do not believe it is.

FOIA EFFECT ON SECRET SERVICE PROTECTION

Senator HATCH. I do not either. I think that is one of the real problems that really has to be overcome.

Stuart Knight said in 1978, 3 years ago, that he would recommend that the President not visit at least two cities in the country and you are now saying that condition has deteriorated. It concerns me that a country that has been as free and open and as citizen-oriented as this country has been has these restrictions on the travel of its Chief Executive.

I am sure that concerns you also.

Mr. BURKE. Yes, sir, it does.

Senator HATCH. And it must concern every agent who has to work on these cases to know that he has the obligation of throwing himself in front of the President when, in fact, he does not have the best intelligence information or even the material that he used to have available to him.

Mr. BURKE. Mr. Chairman, our dilemma is possibly best explained by describing the Secret Service as a system. Most people view the Secret Service as a bodyguard operation, because, of course, they see the agents with the President; they see the agents surrounding the armored car.

There is much more to protection than that. There is advance intelligence that must be gathered and interpreted. There are advance security surveys where agents actually go out and examine the physical environment that the protectee will move in. There are armored cars and developing and maintaining the state of the art in wide areas of technology.

There are a whole host of things—training, for example—that go into the Secret Service protective system.

When you remove or seriously diminish some factor in that system, you throw an increasing burden on the rest of the system.

The crisis that we see in the area of intelligence has placed an increasing burden on our special agent force. Our men and women put in extraordinary hours overtime now, and they work under great stress. This situation has added to that burden a great deal.

DECLINE IN THE NUMBER OF INFORMANTS

Senator HATCH. I indicated in my opening remarks that the FBI had close to 1,100 informants in 1975 monitoring the activities of terrorists and extremist groups on both the far left and the far right.

By July 1978, there were only 42 such informants nationwide.

I presume that is the case on the State and local levels.

Back in 1978, we asked this question: What percentage of informant information do you have today, compared to pre-Freedom of Information and Privacy Act enactment?

Mr. BURKE. Our experience would be almost precisely akin to the statistics you just cited for the FBI, because we are primarily a recipient of that intelligence. In other words, we receive our information primarily from the Bureau, from the Central Intelligence Agency, and the other agencies.

Any decrease in their ability indirectly affects us.

Within the Secret Service, it is very difficult to say how many informants are not coming forward. It is very difficult to quantify. I imagine it is a great deal; subjectively, I know it is.

Senator HATCH. Some indicated that we only have maybe 25 percent of the informant information that we used to have before these acts were enacted. Is that a fair characterization, or would that be too high or would it be too low?

Mr. BURKE. In my subjective judgment, Mr. Chairman, I would say that it is pretty close. I would say 25 percent is a good figure—maybe less.

Senator HATCH. Senator DeConcini, I apologize for asking so many questions. Let us turn to you now.

Senator DECONCINI. Mr. Chairman, I think the questions are very well put and right to the point.

Mr. Burke, on the intelligence matter, I guess it is no secret to the public and law enforcement that without good intelligence you cannot enforce the laws and you cannot do much on a preventive basis. Would you not agree with that?

Mr. BURKE. I agree absolutely, sir.

Senator DECONCINI. As well intended as the Freedom of Information Act is, I think it does have some problems. It seems to me like it has gone too far and, in fact, may have a deterrent effect from

good law enforcement and that we ought to find some corrective measures.

Let me address a couple of items on S. 1394, and I want to thank you for your preparation in regard to that bill today.

This bill contains provisions that would extend the physical zone of protection legislation to all persons under the physical protection of Federal investigative or law enforcement agencies. Currently this zone of protection authority exists only for the protection of the President.

This bill would provide a specific criminal offense for violations of this zone for protectees of the Service and provide a further deterrent for unauthorized personnel to penetrate security areas established by law enforcement authorities.

This was a legislative recommendation of the House Select Committee on Assassinations but has never been implemented.

Would you find it beneficial to extend the protection of 18 U.S.C. 1752 to all other protectees of the Service, as this legislation proposes? What, in your estimation, would be the benefit of such a provision?

Mr. BURKE. We have found through experience that the secure environment that 1752 provides the Secret Service deters potentially dangerous situations before they occur. In other words, we can control the environment that the President will move in.

It also allows us to secure and insure safe evacuation routes.

As you have already said, 1752 does not apply to other protectees, as now written. Yet the situations are very easy to imagine where we would need, in certain circumstances, the same type of guarantees.

Indeed, the expansion of authority was recommended by the House Select Committee on Assassinations.

We think it would be a very big plus to our security effort to be able to expand 1752 to our other protectees.

Senator DECONCINI. Without giving away any trade secrets, what do you do now? Do you just go ahead and do it when you have a protectee?

Mr. BURKE. Yes, sir, in a sense, we do.

The dilemma we have is that we have to rely on State and local ordinances. They vary from jurisdiction to jurisdiction.

That causes inconsistency. It causes confusion. In some cases, there just do not exist the types of ordinances that we can use.

Senator DECONCINI. This would make it very clear to local law enforcement too that the responsibility was yours.

Mr. BURKE. I would think that local law enforcement would be very much in favor of this expansion.

Senator DECONCINI. The bill also gives the Secret Service the jurisdiction to investigate "all laws applicable to offenses involving, or in any way relating, to the electronic transmission of transfer data for United States or foreign government funds."

You touched on it a little bit, but why do you feel that the Secret Service should be given such jurisdiction in the area of electronic funds transfers? How will this improve your criminal investigative readiness and productivity?

Mr. BURKE. Historically, Treasury checks have transferred Government funds. The Secret Service has investigated the counterfeiting, forgery, and the altering of these checks.

New technology—electronic funds transfer and direct deposit, if you will—will replace Treasury checks as a means of transferring funds.

To continue to protect the Treasury, the Secret Service needs to be able to investigate this type of fraud. What this legislation would do is maintain the status quo in the context of advancing technology.

We have trained in the past, and continue to train, agents in computer-related crime. We have successfully investigated and had the U.S. courts prosecute many such crimes.

We do not consider it an intrusion on another agency's jurisdiction because it more clearly defines jurisdiction that has been traditionally that of the Secret Service.

We do not think that it would intrude on our ability to protect those we are charged with by overloading us, because it would really be backfilling for a decrease in the issuance of paper checks that we see coming down the road.

Senator DECONCINI. Legislation before the committee would add a new section 510 to title 18 of the United States Code to make it a felony:

One, to forge an endorsement or signature on a Treasury check or bond or security of the United States; or

Two, to pass or attempt to pass such an obligation, knowing that it bears a forgery.

The bill would also make it a felony to knowingly exchange or possess, with knowledge of its false character, an obligation of the United States that has been stolen or bears a forged endorsement.

What is your reaction to the creation of this new section under title 18, and how would this provision affect the investigative efforts of the Secret Service?

Mr. BURKE. Senator, it would remedy a problem that the Secret Service has had for a long time.

We presently prosecute under title 18, section 495, Treasury check violations. Section 495 really pertains to contracts, deeds, powers of attorney, forgery, and altering of other writings. Section 495, therefore, was not specifically drafted to deal with Treasury checks or bonds or other obligations.

Let me carry that further.

It is possible now, for example, for a thief to steal Treasury checks and sell them to middlemen and not violate 495.

It is also possible for a thief to steal a Treasury check endorsed by the payee, endorse his own name, and obtain proceeds without violating 495. Section 510 would clear up these inconsistencies. It would make it a felony to forge the endorsement, as you said. It would make it a felony to pass or attempt to pass with knowledge that the instrument was forged. It would also make it a felony to possess the obligation knowing that it was stolen or forged.

Finally, it would allow a misdemeanor charge also for those cases under $500 which the courts and U.S. attorneys are sometimes reluctant to accept for prosecution.

Senator DECONCINI. The chairman of this committee has been one of the leaders in trying to restrain Federal expenditures. We are, indeed, sensitive to costs—both in dollars and in manpower—that any new legislation might generate, particularly in these times.

Nevertheless, among our highest priorities, in my opinion, should be the adequate support of law enforcement agencies.

Could you tell this committee what is your best estimate of the potential costs of implementing this legislation in terms of your manpower levels, appropriation requirements, or increased workload even though they may be estimates? Would you give us as much information as you can?

If you would like, we could have that provided for the record if you need some administrative backup.

Mr. BURKE. Thank you, Senator. I would like to provide that for the record.

Senator DECONCINI. Thank you.

[Material to be supplied follows:]

COST OF IMPLEMENTING S. 1394

The provisions of S. 1394 which relate to our protective efforts would not add to Government costs. These provisions would contribute to the efficiency and effectiveness of operations. The provisions of S. 1394 which relate to expanding investigative jurisdictions would primarily provide for criminal cases to take the place of those cases lost to us by direct deposit electronic funds transfer and U.S. Attorneys prosecution policies. At present, the cutback in such cases from electronic funds transfer has been insignificant; however, we expect the impact to be greater in the future.

We would establish a system of investigative priorities based upon the prosecutive guidelines of the U.S. Attorneys. Manpower will be concentrated on those higher priority cases with the likelihood of prosecution. The implementation of this policy would maintain a case load for the Service at approximately the same size as present without an increase in resources.

In the expansion of Secret Service jurisdiction into the theft and counterfeiting of marketable securities, the increase in case load is unknown since no agency has concentrated on this area. We would, of course, advise the Congress of the scope of the problem after some experience is gained.

Senator DECONCINI. The legislation we are reviewing grants the Secret Service authority to investigate offenses against the laws of the United States relating to the counterfeiting or theft of marketable securities and to make arrests in such cases.

Can you tell us why you believe that the Secret Service should have jurisdiction over counterfeiting and theft of marketable securities and what steps your agency would take to properly investigate, enforce, and expand what you are already doing in that area?

Mr. BURKE. Senator DeConcini, the Secret Service, I believe, is the premier agency in the enforcement of counterfeit violations. We have over 100 years of experience in combating all types of counterfeiting violations.

As I said earlier, in the last fiscal year, only a little over $5 million was passed on the public in counterfeit currency. We seized over $55 million.

Our agents are trained in the field of graphic arts and recognition of counterfeit documents and the techniques of counterfeiting. Each agent is actually trained in how to counterfeit money.

In undercover operations, our agents are quite expert.

We have regularly established contacts with bank note companies and financial institutions and the manufacturers of printing equipment. Also, quite significantly and a future problem for the Government in counterfeiting will be the widespread use of color copiers and the capability of color copiers. We have maintained an effective liaison for years with the manufacturers of color copiers.

There are many cases we have investigated in the past on counterfeiting and forgery that have led right into stolen or counterfeit commercial securities. The two crimes go hand in hand. It is common for criminals who deal in one to deal in the other. For example we have been investigating a counterfeiting operation. Instead of coming up with counterfeit currency, we have come up with the other type of counterfeit paper.

The Secret Service also investigates on two levels. Primarily, and most importantly, we investigate on the manufacturing level as our statistics indicate. In fiscal year 1980 seizures of $55 million were made prior to circulation.

We believe that is the most effective type of law enforcement—to stop it before it gets out.

We sometimes are forced to investigate on the distributor level after counterfeit money has been passed out to the network of distributors. We make a lot more arrests this way, but it does not protect the public as well nor is it as cost effective.

One other statistic that I might give you is this.

From 1968 through 1980, the overall seizure of counterfeit currency, before being passed on the public, was 85 percent. That amounts to $365 million. We think we have a very effective track record in this area and believe we can do an effective job investigating the counterfeiting of marketable securities.

Senator DECONCINI. So that I understand it, if your agents lead you to a counterfeiting arrest and you find other Government documents there, do you seize them? Can you make arrests based on the fact that they are forged or stolen or what have you, or are you prohibited from doing so? Do you turn it over to Justice, or just how does that work now?

Mr. BURKE. We have the authority to arrest for felonies committed in our presence. In many of those cases, that automatically takes effect.

However, if we get an indication that this investigation involves not counterfeit money but other types of counterfeiting, we inform the approprite law enforcement agency. They will undoubtedly ask us to continue the investigation and work with them.

Senator DECONCINI. Which you would do.

Mr. BURKE. Which we would do, not because it is necessarily our responsibility or authority, but because we are in it and we have the expertise. Law enforcement officials work very well together under those situations, sir.

Senator DECONCINI. Finally, Mr. Burke, and Mr. Chairman I thank you for indulging me in these somewhat technical questions, S. 1394 would permit the reimbursement of agents for subsistance expenses while in a nontravel status. Could you tell us why this provision will benefit the Service and what the background of that need is?

Mr. BURKE. Our Director is constantly looking for ways to relieve the burden on our agents. As you know, it is a stressful job. It is a job that requires a great deal of overtime.

This is one small area where possibly the Secret Service could do something for its agents.

We must provide protection on a 24-hour-a-day basis of which the majority is accomplished by field agents. As I said earlier, one of the very great benefits of your bill is to strengthen our field operations.

The protective details are not sufficient by themselves to protect the President or anyone else. They are augmented by the field offices when the protectee travels.

Those local field agents are frequently forced to remain overnight at the downtown hotels—frequently, the most expensive hotels—and they are not eligible under present regulations for reimbursement of their actual expenses. They must pay those expenses out of their own pockets.

This aspect of the bill would allow the Secret Service to absorb this cost.

Senator DECONCINI. Is there any procedure for reimbursing them or changing the shift or putting somebody else there?

Mr. BURKE. No, sir.

Senator DECONCINI. What do they do? Do they just have to absorb those expenses?

Mr. BURKE. That is exactly right, Senator. They have to.

Senator DECONCINI. Do you have any idea what that amounts to in dollars?

Mr. BURKE. In the past, I have been assigned to the field offices as well as protective divisions. So I know it has cost me and other agents a considerable amount of money. You just do not go to some of these expensive restaurants and walk out without spending a large sum of money.

It would be a tough guess. It is a significant amount of money to an agent's household budget.

Senator DECONCINI. I hope they deduct it as a business expense.

Mr. BURKE. As a matter of fact, I did not. Maybe I should go back and do it.

Senator DECONCINI. Thank you very much for your testimony and for answering the questions. And thank you, Mr. Chairman, for your indulgence on some of these matters of S. 1394. It was very helpful.

Senator HATCH. Thank you, Senator DeConcini.

In the summer of 1979, FBI Director Webster furnished legislators with a collection of about 125 actual illustrations, with names deleted, of recent refusals to provide information for FBI investigations by various persons, including a Federal judge, for fear of disclosure of the source's identity under the FOIA or Privacy Act.

I am not going to take time to read these, but I would put these in the record at this point, without objection.

[The FBI illustrations from Director Webster follow:]

Impact on Current Informants or Potential Informants Resulting From Present FOIPA Disclosure Policies

Three individuals were separately contacted in an effort to obtain their cooperation in organized crime matters. Each of these individuals advised the contacting Agent they felt their confidentiality could not be maintained due to current FOIA legislation. It is believed these individuals would have been cooperative had they not feared the FOIA and they would have been valuable FBI informants. Because of the wide publicity which the FOIA has received, these individuals were well aware of the public's ability to gain access to information in FBI files.

Shortly after a skyjacking began, an unidentified caller stated to a Special Agent that he was a medical doctor and that the skyjacker was probably identical to an individual who was an outpatient at the psychiatric clinic where the caller was employed. He stated the individual was schizophrenic and was dangerous to himself and to other persons. The caller suggested that a psychiatrist should be available during all negotiations with the skyjacker. The caller's identity was requested since he was obviously knowledgeable concerning the skyjacker and could furnish possible valuable information in an attempt to have the skyjacker peacefully surrender. Despite the fact that several lives were in jeopardy, the caller stressed that he was unable to furnish his name because of FOIPA requirements and terminated the call. Because of this telephone call, the FBI did have a psychiatrist available during negotiations with the skyjacker (who had been correctly identified by the caller) and the skyjacker's surrender was accomplished without loss of lives or property.

For approximately three years, a telephone caller known to the FBI Agent only by a code name furnished information in a wide variety of cases, from drug-related matters to terrorism. The caller never identified himself and advised he could never testify since to do so would risk death. The caller finally terminated his relationship, expressing fear that an inadvertent release of information by the FBI, under the FOIA, might identify him.

In a bank robbery investigation a high school student was identified as a suspect. When officials at the high school were approached in an attempt to obtain necessary information concerning the suspect (descriptive data, address, whereabouts, etc.), the officials declined to furnish the information due to the FOIPA. After the loss of precious time, the school principal was finally convinced that the student posed a threat to the community, in view of the fact he was armed and probably desperate. He eventually provided the information and the student was arrested.

During the course of another bank robbery investigation a warrant was obtained for a female subject. The investigation determined the subject had applied for a job through the state unemployment office. That office refused to provide any information, advising it was protected by state and Federal privacy acts. It was necessary to obtain a subpoena to force the unemployment office to disclose the requested information. During the period of time between the service of the subpoena and its return, the subject committed another bank robbery. The FBI believes that if the information had been disclosed at an earlier time, the second bank robbery would not have occurred, as the subject would have been arrested more promptly.

One FBI office received information from an AUSA indicating a woman had information concerning ghost employees and other frauds within the Comprehensive Employment and Training Act (CETA) program. When contaced, the woman refused to be interviewed because she feared that her identity might be disclosed through an FOIPA request.

An individual in a position to know information about an FBI subject stated to a Special Agent that she would not furnish any information lest it and her identity appear in the newspapers. She made reference to information which was being published in the press as a result of an FOIPA request.

An Agent was recently in contact with an individual believed capable of providing reliable direct and indirect information regarding high-level political corruption. This individual advised his information would be furnished only if the contacting Special Agent could guarantee that the individual's identity would never be set forth in any FBI files. The contacting Agent attributed this individual's reluctance to have his identity set forth in FBI files to a fear of the FOIPA and its effect on the FBI's ability to maintain confidentiality of information from informants.

In August 1976, an FBI field office contacted a source to determine why he was not now providing the FBI with information as he had been in the past. This source replied that he was in fear of losing his job and of retaliation by individuals about whom he might furnish information. The source asked if the FBI could guarantee the confidentiality of his relationship and of the information he furnished. He stated he was particularly concerned about confidentiality in light of the FOIA. In view of his apprehensions, this individual is no longer being contacted by the FBI.

A particular organized crime case involved an investigation to identify male juveniles being transported interstate for homosexual activity. Due to fear of reprisals stemming from FOIA disclosures and PA problems, various school officials would not cooperate in the investigation to verify the identity of the juveniles. In the same case, prominent citizens in a community displayed reluctant cooperation with the FBI out of fear of FOIA disclosure.

A potential source advised he would not cooperate with the FBI due to fear his identity would be publicly revealed, which would be detrimental to his profession. This potential source referred to news accounts in the local press regarding material made available under the FOIA, which had disclosed the names of several individuals in professional capacities who had assisted the FBI and the nature of their assistance. This type of publicity, according to the potential source, would be detrimental to any individual in business who elected to cooperate with the FBI.

A special agent advised that an individual in a high management position in a state agency wished to provide information to the FBI on a confidential basis. During one of the agent's initial conversations with this source, confidentiality was requested, specifically that the source's name never be mentioned in FBI files due to "past legislation, FOIPA, etc." This person was in a position to furnish information concerning white-collar crime and political corruption; however, the potential source subsequently refused to cooperate with the FBI, in spite of the agent's assurances.

An FBI office has had success in developing a number of valuable informants from a group of loanshark victims. Recently, upon interview, several of these individuals stated a desire to cooperate, but have refused to do so for fear of the subjects of the investigation learning their identities through an FOIPA release.

A criminal informant, who furnished very significant information in an automobile theft ring case, advised he feared for his life after reading in various newspapers of disclosures made under the FOIPA. As a result, this source will no longer furnish the information which is singular in nature.

Several attempts have been made to reactivate a former source, who had been extremely cooperative and productive. Current attempts to persuade the source to once again aid the FBI have been negative. The former informant refuses to cooperate, as he believes his identity cannot be kept secure due to FOIPA disclosure policy.

An informant was recently closed inasmuch as the source advised he believed the FBI could not efficiently protect the confidentiality of his relationship and his identity, due to the FOIPA. This source has previously provided excellent information regarding gambling and organized crime. He stated that he is afraid, if his name ever surfaced as providing information to the FBI, he would lose his business and everything he has worked for in his life.

In 1976, an active informant stated he would no longer continue in that capacity because it was his belief as a result of the FOIPA, his identity and confidentiality could no longer be protected.

In an Interstate Transportation In Aid of Racketeering investigation, an individual was successfully developed as a potential source of information concerning racketeering and political corruption. However, upon learning of the provisions of the FOIPA, this individual requested that his conversations not be recorded and refused further cooperation.

Another field office informant related a conversation which occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI will be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected the provisions of the FOIPA would be successfully utilized in identifying FBI informants. Agents subsequently contacting this valuable source have noted a subtle reluctance on his part to more fully penetrate the particular organized crime activities which he is in a position to cover.

An FBI office in a major city has received information from several reliable informants that most organized crime members in the area have been instructed to write to FBI Headquarters requesting file information pertaining to themselves. These informants have advised the sole purpose of this process is to attempt to identify informants who have supplied information to the FBI on organized crime matters. Requests have been submitted by virtually every organized crime figure in the area.

An informant who has a great deal of knowledge concerning a violent group is reluctant to furnish information on the gang because of the FOIPA. He has considerably reduced the amount of information he furnishes to the FBI.

An informant who has furnished considerable information concerning a terrorist organization advised that he is very upset about the FOIA. He has learned through conversations that former and current extremists are writing to FBI Headquarters

under the FOIA in an effort to identify and expose informants. The informant indicated he is apprehensive about the Bureau's ability to properly safeguard information furnished by him.

A long-time confidential informant stated, "I can't help you any more due to the Freedom of Information Act." This informant had previously furnished valuable information which led to arrests and recovery of Government property. Even though the promise of confidentiality was explained to the informant, he still refused to furnish further information.

A former informant regularly furnished information resulting in recovery of large amounts of stolen Government property and the arrest and conviction of several subjects. In a pending case, the former informant refused to cooperate because of his fear of the FOIPA, which he felt would in fact jeopardize his life should he continue cooperating with the FBI.

In January, 1978, an office of the FBI received information one prime bombing suspect was applying under the FOIA for his file. Sources close to the suspect advised he was seeking to discover the FBI's knowledge of his activities and the identities of agents who were investigating him.

In a western field office, a former highly productive confidential informant advised that he did not feel secure, due to widespread publicity concerning FBI informants and the FOIA legislation. He stated that, although he continued to maintain his confidentiality regarding his relationship with the FBI, he was not sure that the FBI could do the same. Due to this source's feelings, he discontinued all contact with the FBI.

An informant furnished information concerning organized crime figures and on organized crime conditions. Subsequently, the source acquired the conviction that no guarantee could be given that his identity would be protected. Accordingly, the source declined to furnish any further information to the FBI.

The Drug Enforcement Administration (DEA) was advised that an informant of one FBI office might be in a position to provide timely information concerning large narcotics shipments, in exchange for a reward from DEA and the guarantee of confidentiality. A local representative of DEA responded that confidentiality could be guaranteed by DEA only in instances where the informant was operated by DEA as a source. DEA reward money could be paid to any individual supplying information; however, the true identity of an FBI source would be reflected in DEA records for such payment. The FBI source was advised of the results of the inquiry with the DEA. The source subsequently furnished the identities of the drug subjects of which he had knowledge. This information was disseminated to DEA. However, the source declined to have further contact with these subjects, for fear his identity would be made known at some later date under an FOIA request to DEA.

An FBI informant is well connected to the organized crime element. Over the past year the informant's productivity has dramatically decreased. Consequently, this decrease was discussed with the informant, who stated that he had begun to doubt the FBI's ability to protect the contents of its own files and information provided by its informants. He had learned that an organized crime figure had received over 300 pages of FBI documents and was unquestionably trying to identify informants.

The criminal informant coordinator of a northeast office has been told by an individual, who would potentially be an excellent source of criminal information on the waterfront, that even though he had cooperated with law enforcement personnel in the past he would never do so again. He stated that he was afraid that one day, as the result of FOIPA, he might "see his name in the newspaper."

An informant who has been furnishing information to special agents of the FBI since 1953, regarding gambling, prostitution, stolen goods, and criminal intelligence information, when last contacted by an agent, indicated he would no longer furnish any information to the FBI due to the fact it could be disclosed under the FOIPA. The informant felt his personal safety could be jeopardized by the disclosure of his identity, and he no longer wanted to take the personal risk and provide information regarding criminal activities.

An organized crime informant has expressed great concern over his safety due to the recent disclosure of information released under the FOIPA. A special agent has advised that he believes the informant will terminate his relationship with the FBI because of his concern.

A confidential source stated he was fearful his name would become known to certain individuals. He cited their possible access through FOIPA requests to the information he has provided. The source became unproductive and contact with him was discontinued.

A confidential source advised that "general street talk" was that one should not provide information to the Government since this information would eventually be publicized as a result of the FOIPA.

A long-time informant announced that he felt his confidentiality could no longer be guaranteed and refused to furnish further information. Provisions of the FOIPA were explained to the informant, particularly relating to disclosure of informants and informants' information; however, this informant still wishes to sever contacts with the FBI.

Agents recently contacted a former criminal informant who associated with several individuals currently under investigation. The source, who displayed knowledge of the FOIA, expressed extreme concern of the disclosure provisions. The two agents spent approximately one-half hour discussing this with the source. Both agents were of the opinion that the FOIA prevented them from obtaining details of value.

An asset advised that, while talking with an individual who is a known intelligence officer of a foreign country, he was advised that certain officials of that country were using the FOIA law to obtain information from the files of the FBI and other agencies through intermediaries. The official expressed some humor over the fact that such information is available.

An individual, who is in a position to furnish possible foreign counterintelligence information, expressed the opinion the Federal Government could not protect his identity in view of the constant scrutiny by Congress of the FBI and CIA and the subsequent news media leaks. This individual also stated he would be fearful that his identity would be revealed through access to records by the public under the FOIA, as well as extensive civil discovery proceedings exemplified by the Socialist Workers Party civil lawsuit. In addition, this individual expressed concern over former intelligence agency officers who were publishing books, possibly jeopardizing the confidentiality of sources.

In another FBI security investigation, an individual was located who was in a unique position to act as an operational asset in foreign counterintelligence activities. While willing to assist the U.S. Government for patriotic reasons, this individual felt his identity might be revealed under the FOIPA. He therefore felt compelled to report a pending highly sensitive undercover operation concerning national security to his employment supervisors, thereby jeopardizing that most sensitive operation.

An informant expressed deep concern over security and possible disclosure of his relationship with the FBI, noting recent instances in which FBI sources had been identified in the press. The informant, who had provided critical information for many years in matters of the highest sensitivity, requested that his relationship with the FBI be terminated and that his name be deleted from the FBI records.

One informant is a well-known and highly respected individual with many dealings with certain foreign countries. The informant has repeatedly voiced concern over possible disclosure of his identity through the FOIA. The source has now requested that all contacts be minimized in frequency and duration, that all information furnished by paraphrased, that his real or code names never be used, and that access to his information be severely restricted within the FBI. It has become apparent also, that while the informant's dealings with certain foreigners are known to have increased, the frequency of his FBI contacts, the length of these contacts, and the amount of substantive information furnished have declined.

A former source of excellent quality was recontacted, since his background was such that he could develop information of value concerning a terrorist group. After three hours of conversation, the former source agreed to cooperate with the FBI but only in a very limited manner. He stated that due to the FOIA he no longer believes that FBI agents can assure his complete protection. He made it clear that he will never again function as he had previously in behalf of the FBI, noting that disclosure of his identity would most assuredly cost him his life.

An individual who has requested his identity be protected and who has provided information pertinent to a suspected foreign government intelligence officer, has also expressed concern pertinent to revelation of his identity as furnishing information to the FBI. This individual querried the special agent involved in the investigation as to whether his identity could be protected and stated that he was concerned because of future business dealings with certain foreign countries. He felt that should his identity become known to foreign government officials, it would cause damage to his business relationships. Because of the above, this individual stated that he did not wish to be contacted on a regular basis by the FBI.

In September, 1977, a former special agent advised an FBI agent that an informant had contacted him upon learning that an FBI subject had obtained documents under the FOIPA. The informant expressed the fear that his identity as a confidential source against this subject would be revealed. This subject was trying to identify individuals who had provided information to the FBI concerning his activities.

In a western FBI office, and individual was contacted in a recent foreign counterintelligence investigation, as he was in a position to furnish valuable information on

a continuing basis regarding the subject. Although this potential source displayed an otherwise cooperative attitude, he stated he would not furnish information for fear his identity might be revealed at some future date due to provisions of the FOIA.

Members of an organization dedicated to bringing about a movement based on Marxism-Leninism, recently discussed the FOIA. A decision was reached to direct inquiries to both the FBI and the CIA under provisions of the FOIA requesting information concerning the organization. It was anticipated that a comparison of information concerning individuals, including dates, times and activities, would identify informants in the organization.

In 1976, a most valuable and productive FBI informant ceased his activity in behalf of the Bureau. His reason for this decision was his concern over the FOIA, which he believed offered the distinct possibility of disclosing his identity as an informant. This source provided coverage on two major subversive- and/or violence-oriented groups of investigative interest.

Recently an informant, who is furnishing information regarding certain foreign visitors to the United States, expressed great concern over the possibility of his identity being disclosed. The source stated that he recently read in a local newspaper that foreign visitors could gain access to FBI records through the FOIPA.

A businessman was being approached by an intelligence officer of a foreign government. Upon interview by the FBI, the asset stated that were it not for the FOIPA, he would be willing to be operated against this and other hostile intelligence officers. However, because of FOIPA, he felt a real danger that his identity would be divulged which would in turn seriously and detrimentally affect his business overseas. For this reason, asset has refused to become involved in a foreign counterintelligence operation.

Since the advent of the FOIPA, numerous documents containing information furnished by an FBI asset of long-standing have been released under provisions of these laws. These releases have had a deleterious affect upon an asset's relationship with the FBI. There has been a noticeable decrease in the volume of information furnished by the asset, who has been frank to state that he no longer has his former confidence that the FBI can maintain the confidentiality of his relationship. On numerous occasions, the asset has expressed reluctance to furnish information which he fears might be released under the FOIA, resulting in his physical jeopardy or leaving him open to civil suit. This asset has not yet terminated his relationship with the FBI, but the relationship is now a very tenuous one.

A source who previously furnished information on a time basis relating to foreign terrorist activites has expressed reluctance to furnish additional information because of the possibility of his identity being exposed due to the FOIPA.

Senator HATCH. Thank you so much, Mr. Burke. We appreciate your being with us.

Our next witness is James Wieghart of the American Society of Newspaper Editors.

Mr. Wieghart is currently the executive director of the New York Daily News. He has been with them since 1969 and served as the Washington bureau chief for 7 years.

He previously worked for the Milwaukee Sentinel.

The Freedom of Information Act has been a valuable tool for the media, and we intend to see that it remains an effective aid to newspapers.

Mr. Wieghart, we welcome you—a long-time Washington journalist—back to the Capital and look forward to discussing that topic with you.

We turn the time over to you.

STATEMENT OF JAMES WIEGHART, AMERICAN SOCIETY OF NEWSPAPER EDITORS

Mr. WIEGHART. Thank you, Mr. Chairman.

I am appearing here before this committee to represent the American Society of Newspaper Editors.

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The American Society of Newspaper Editors is a nationwide professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States.

Therefore, we do, Mr. Chairman, have an abiding interest in the Freedom of Information Act.

What I would like to do is summarize my statement, which I will submit for the record.

I would like to make some comments on your statement, Mr. Chairman, and on the statement just given by Mr. Burke for the Secret Service.

Pending before Congress are proposals that would drastically limit the types of information available to journalists and other members of the public under the Freedom of Information Act.

These proposals, in my judgment, would provide blanket exemptions to the CIA, the FBI, and other Federal law enforcement agencies as well.

Before going into that area, I would just like to comment on another proposal—Senator Dole's bill—which would broaden the exemption currently enjoyed now by the business submitters of information to Federal agencies.

As you know, exemption 4 of the Freedom of Information Act exempts from disclosure under the act "trade secrets and commercial or financial information obtained from a person, privileged or confidential."

Despite this exemption, a number of spokesmen for the business community have appeared before your subcommittee and said that the Freedom of Information Act can be used as a tool whereby an actual or potential competitor can unearth sensitive business and financial information.

This, of course, is the purpose of Senator Dole's bill.

However, these claims made by some of the witnesses before your committee that additional protection is needed, in my judgment, looking at the testimony, have not been supported or substantiated.

They have said that they face a competitive disadvantage if such information is released, but they have been unable to cite a single instance of competitive injury resulting from Freedom of Information Act disclosures.

A recent study by Prof. Russell B. Stevenson, Jr., of the George Washington University Law Center concluded that businesses have failed to prove a need for broader protection in this regard.

The exemption that Senator Dole proposed would exempt "information which would not be customarily disclosed to the public by businesses." This exemption would cover all information turned over to the Federal Government by business enterprises other than, of course, promotional and advertising material.

If that exemption were broadened, as Senator Dole suggests, important consumer product safety information, for instance, which is submitted to the Government by businesses, would not be available to the general public.

Turning to the exemptions proposed for the FBI and the CIA, we contend that it would really render ineffective the Freedom of Information Act as it relates to those two particular agencies.

I might now add, on the basis of Senator DeConcini's proposed bill, it would add the Secret Service as well.

One of the proposals, S. 1273, by Senator Chafee, would in effect provide a blanket exemption to the CIA. This bill would amend the Central Intelligence Act of 1949 so that information and files maintained by the Central Intelligence Agency would be exempt from the disclosure obligations imposed by the Freedom of Information Act "if such files have been specifically designated by the Director of Central Intelligence to be concerned with special activities in foreign intelligence, counterintelligence, or counterterrorism operations."

In this particular proposal, there is no definition provided for "special activities." Theoretically, at least, the Director of the CIA could shield all CIA files from disclosure simply by designating them as being concerned with "special activities."

Your own bill, Senator Hatch, S. 587, would provide an equally broad exemption to the FBI and other Federal law enforcement agencies, thereby virtually exempting such agencies from the disclosure obligations imposed by the Freedom of Information Act.

That bill would impose a 10-year moratorium on the release of "any records maintained, collected, or used for law enforcement purposes which pertain to a law enforcement investigation."

Thus, notwithstanding that a record may not disclose the identity of a confidential source or satisfy other of the prerequisites for exemption under the existing act, the law enforcement agency has carte blanche to withhold the information until 10 years after the termination of the investigation.

If the investigation should result in a successful prosecution, that would extend the blanket period to 10 years beyond the serving of sentence by that person convicted.

There is another section in your bill, Senator Hatch. Exemption 7 would be amended to permit withholding of records which would "disclose information relating to any conspiratorial activity specified by the Attorney General."

Theoretically, the Attorney General could block disclosure of agency records by finding retroactive to a Freedom of Information Act request that the records requested relate to two or more suspects and that those suspects might have been engaged in conspiratorial activities.

The proponents of these amendments that have come to you, Senator Hatch, and to other Members of Congress—the law enforcement agencies and the Central Intelligence Agency—have conjured up an image of the FBI and CIA making disclosures which allegedly endanger national security and make foreign governments hesitant to provide sensitive information to the U.S. Government, endanger the lives of FBI informants, and impede the law enforcement obligations of the FBI.

However, these same proponents have thus far been unable to cite one single example where a Freedom of Information Act disclosure by either the FBI or the CIA resulted in any of these harmful consequences.

There are important exemptions, as you know—nine of them—in the Freedom of Information Act which deal specifically with the very areas under consideration now by this committee.

Exemption 1, exempts information "specifically authorized under an Executive Order to be kept secret in the interest of national security or foreign policy." That covers all classified information. It covers information classified as confidential if its authorized disclosure could "reasonably be expected to cause damage to national security."

Exemption 3 also provides significant protection to the CIA. That exemption, which exempts information specifically exempted by another statute, has been consistently construed by the court as referring to section 102(d)(3) of the National Security Act which provides: "That the Director of the Central Intelligence Agency shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

In commenting on the protection provided by this exemption and the court's rulings on exemptions claimed by the CIA, Stansfield Turner, who was then Director of the CIA, in a speech before the American Society of Newspaper Editors, in 1980, said: "Thus far, we have not lost a case in the courts where we have claimed that something was classified and therefore could not be released."

Admittedly, information which should be kept secret is occasionally made public. As was made clear by Hodding Carter, a former Assistant Secretary of State who was in charge of the State Department's Freedom of Information Act responses, such information was made public "invariably in ways which have nothing to do with" the Freedom of Information Act.

The situation is the same with the FBI and the other Federal criminal law enforcement agencies.

Exemption 7 permits the FBI to withhold information compiled for law enforcement purposes if that information was obtained from a confidential source, or it would interfere with the enforcement proceedings or would disclose investigative techniques or procedures.

In the court's ruling on some challenges where the FBI and other law enforcement agencies have refused to turn over information based on these exemptions, the courts have construed these exemptions very broadly. They have even held that a confidential source may include a State police department, a local police department, a police officer, Government agencies, or someone from foreign law enforcement agencies.

I think we have to also understand that some of the people who wish to broaden the exemptions are the very people who opposed Freedom of Information from the beginning.

Just some brief history:

The Congress of the United States was the moving force in Freedom of Information when the bill was passed in 1966. Every administration—Democratic and Republican—has opposed the Freedom of Information Act and its extensions: President Johnson and President Nixon. President Ford vetoed the amendments of 1974—all of them. He was overridden by the Congress.

There is an historical reason for this.

The reason is that Congress itself has had some of the same difficulties in obtaining not secrets that are going to blow the cover of the United States or endanger the lives of anybody, but information that is vital to Congress functioning.

The press has had this problem in spades.

It was a union of this combined interest of making available to the Congress and the public and the American people information they needed about their Government which brought about the Freedom of Information Act and the amendments of 1974.

You should know that not only did the administrations oppose the Freedom of Information Act, but they tried to sabotage it after it was passed. That was one reason for the rash of amendments in 1974.

Even to this day, the FBI and the CIA are among the Federal agencies most reluctant to comply with Freedom of Information Act requests, often forcing litigants to go to court and use the exhaustive remedies in order to obtain information—not on confidential sources or informants or things of that nature, because they have that exemption and they invoke it constantly, but I am just talking about bread and butter information on a matter which is under investigation.

Let me give you an example. Recently, several years ago, we had that terrible tragedy in Jonestown where a number of people lost their lives. A Congressman of the United States was shot and killed, along with some members of his staff.

James Reston, Jr., was doing a book on that subject. In the course of his investigation, he learned that the FBI had obtained more than 1,000 hours of tape recorded speeches by Jim Jones, the founder of Jonestown. He thought this material might be useful in his study of this subject.

He made a Freedom of Information Act request on the Department of Justice and the Federal Bureau of Investigation, which was turned down and denied on the grounds that there was a pending investigation into the matter and that some of the material in these tape recorded speeches might impinge upon that.

James Reston, Jr., never did get access to that information on the basis of the Freedom of Information Act. Attorney General of the United States Civiletti, after reviewing the matter at the personal request of James Reston, Jr., directed the FBI to analyze the materials that they had and determine what could be released without impinging on the pending investigation.

As a result of that, after looking at it for the first time seriously, all but 25 of 971 tapes in the possession of the FBI were turned over to Mr. Reston and used in his book.

You should know that there is a 10th exemption which Carl Stern, a journalist and a lawyer, has facetiously described as the "we are not going to tell you" exemption. It is utilized constantly by the Federal Bureau of Investigation and by the Central Intelligence Agency.

Despite all of these problems with the Freedom of Information Act, and I know it is a burden to some extent on some of the administrative agencies, and despite their unwillingness to cheerfully comply and their efforts to make it difficult for the public and journalists in some cases to get information to which they are entitled, the act has been a positive benefit both to the public and to the press of the United States, and I think to the Congress of the United States.

We learned from Freedom of Information disclosures of the vast FBI 15-year investigation, called Cointelpro, in which the National Council of Churches, the Socialist Workers Party, the Southern Christian Leadership Conference, members of the Republican and Democratic Parties, and officeholders in the Republican and Democratic Parties were routinely subjected to investigation. That came out as the result of a Freedom of Information request.

Many of the CIA abuses during the period when the Congress of the United States itself conducted a very thorough investigation of abuses of power and many of the details of that were made available to the public for the first time through the Freedom of Information Act.

The testing program that the CIA conducted in the 1950's and 1960's with drugs—hallucinogenic drugs—on subjects who did not know they were being tested—that information was developed through the Freedom of Information Act.

In this society, Congress comes, and it goes. The President comes, and he goes. The bureaucracy remains.

Unlike you, Senator Hatch, the bureaucracy does not go back to its constituents and submit its record for approval. They are in power. They are put there, and they stay there. Many of them are dedicated women and men, and they have the interests of the Nation at heart, like yourself.

Sometimes, however, power corrupts. Sometimes when power is not subject to public check or an election, it corrupts enormously. We have recent experience with that.

In referring to the testimony this morning and to your own statement, I am not at all surprised that the FBI's list of informants has dwindled over the last decade. Let us look at who those informants were.

Do we really need informants from the Southern Christian Leadership Conference? Do we need informants from the National Council of Churches? Do we need informants from the Democratic Party, spying on their own members? Do we need informants into religious organizations, civic groups, and civil rights groups? Is this the subject of investigation that you want to sponsor?

That is a large portion of the informants that the FBI has lost—those very areas. They are investigative areas that the FBI to its credit no longer feels are necessary to investigate.

They have learned that because a person belongs to a political group, that does not necessarily make him an extremist. That, again, is to the credit of the FBI.

In connection with Mr. Burke's testimony for the Secret Service, I am not surprised that local law enforcement agencies are refusing to cooperate with Federal agencies if that is indeed the case—not because the Freedom of Information Act has turned up the names of confidential informants and thereby endangered their lives—which, by the way, Mr. Burke provided no names for that nor has any other witness—but because the head of the Secret Service of the United States, the head of the Central Intelligence Agency of the United States, and the head of the FBI of the United States are going around and making public speeches and saying that they cannot protect confidential informants.

If they cannot protect confidential informants, I would like to know why, and I would like to know which confidential informants were exposed to the public over their objections through the Freedom of Information Act.

I know of some confidential informants whose names were disclosed by the FBI. There was a criminal case in Cleveland. Clearly an FBI employee sold the names of confidential informants to an underworld source. These people were subject to retaliation.

I have yet to find the name of an underworld informant who cooperated with Federal officials whose names were disclosed to the public through the Freedom of Information Act.

That is the issue here.

It seems to me that one of the pertinent questions to put to Mr. Knight or Mr. Burke or Mr. Casey or Mr. Webster is: Don't give us a list of the 125 law enforcement agencies which no longer cooperate. Give us a reason why. Give us the answer as to why these people think that you cannot safeguard your confidential sources from the Freedom of Information Act. What are the cases in which confidential informants have been exposed?

That is really the relevant issue.

Finally, I would like to just say this. I think, Senator Hatch, that members of this committee, yourself, and the American Society of Newspaper Editors and Mr. Burke, Mr. Casey, and Mr. Webster all have the same thing in mind, which is basically to make this the kind of country we can all be proud of and to live up to the Constitution of the United States and to provide good service to the people of this country.

I have no problem with motives. However, I do have a problem with the inclination of any bureaucracy to protect itself from an area of activity that they are not accustomed to dealing with.

For many years, these agencies had not had to be responsive—not only to the press, as I pointed out, but also to the Congress of the United States. They now are more responsive.

They objected just as much—for instance, the Central Intelligence Agency—to making themselves available to the Members of Congress to tell of their activities as they did to the Freedom of Information Act.

Yet the disclosures, such as they are, of secret activities of this Government in the area of national security and in the area of law enforcement have not come about because Members of Congress have been irresponsible or because the Freedom of Information Act has forced disclosures. They have come about because of leaks, as Hodding Carter indicated.

I refer you, for instance, in law enforcement to the Abscam case. As you know, there was a massive leak right in the midst of that investigation before any indictments were brought and widely publicized. That was not the result of a Freedom of Information Act. It was the result of leaks from the Justice Department and from local and State law enforcement officials.

The Justice Department has subsequently taken action against some of the individuals involved.

That is where the problems really are. They are not with legitimate requests for information made under the Freedom of Information Act.

Senator HATCH. I want to compliment you, because I think your statement, representing the Society of American Newspaper Editors, has been the single best statement made by representatives of the media.

Mr. WIEGHART. Thank you, sir.

Senator HATCH. You have expressed the need for access to information better than witnesses I have heard in the 3 or 4 years that I have been concerned about this.

I just feel very good about your testimony here today.

I may not totally agree with it, but I want to commend you.

The Justice Department gave us some excellent testimony a few weeks ago concerning FOIA's impact on law enforcement. Perhaps I could mention just a few of their reports.

Justice affirmed that 40 percent of the requests received by the Drug Enforcement Administration come from current prisoners. Another 20 percent are from individuals known by DEA to be connected with criminal drug activities.

More than 11 percent of the FOIA requests made to the FBI come from prisoners—over 1,600 last year alone. These requests consume far more than 10 percent of the FBI's cost of administering FOIA, which is nearly $12 million.

DEA spends another $2 million a year to respond primarily to criminal requesters.

The conclusion to be drawn from this testimony is that the Federal Government is spending more than $2 million each year to answer FOIA requests filed by felons.

Does this strike you as the proper purpose for the act which was supposed to inform voters? I might mention that imprisoned felons cannot even vote.

Moreover, the initial report on FOIA of expected implementation costs was $40,000 to $100,000. I think the average expectation was $50,000 for all Freedom of Information Act requests ever to be made to the Federal Government during any given year.

We spend more than 20 times that amount—of the $100,000 figure—just to respond to criminal requests in just two Government agencies that we are now talking about.

What is your feeling about this?

Mr. WIEGHART. Senator, I could see where that would disturb a member of the law enforcement community—to turn over information to a convicted felon—maybe even one then serving a sentence in jail.

On the other hand, the exemptions that protect the information which is vital to the law enforcement agency—the names of informants, matters pending in investigation, and so forth—should serve to screen from these people information that they could use for a nefarious purpose.

The only thing I can think of in terms of a felon is this:

Everyone who goes to jail is innocent if you talk to them. I have interviewed many of them, and they have never committed a crime. We tend to dismiss that. And 99 percent of the time, of course, they are lying.

In that 1 percent of the time, those that are telling the truth, I would suppose that most of their time while in incarceration, is spent trying to clear themselves, either by a technicality or by

finding other evidence. I suppose that may motivate some of these requests.

I think it would be difficult to phrase a statute on freedom of information that would specifically exclude these individuals. If they could not do it, their lawyers could do it or their wives or friends could do it and then get the information to them.

On the cost thing, I know that cost is a terrible factor here. However to put it in perspective, it has been estimated that the Freedom of Information Act cost the Government $47 million to administer. That is a substantial amount of money.

Yet we know that the Federal Government agencies spend over $1 billion—I would guess it is close to $1.5 billion—to support public information offices which put out, in many cases, more propaganda about the effective nature of their agencies than it does about public information.

Senator HATCH. I am with you on that.

All I can say is that it costs a lot more than $47 million to administer FOIA.

Mr. WIEGHART. I may be mistaken, Senator.

Senator HATCH. A previous witness noted that we spend $100 million for the Armed Forces bands in this country—so your point is not a bad point.

Still we, as a committee, should look at one situation where there has been apparently an awful lot of abuse of the act by convicted felons who cannot even vote.

Yet your point is a good one. If there is just 1 out of 1,000 who has been unjustly convicted and he can achieve justice through these approaches, isn't that a consideration that must be given?

Mr. WIEGHART. There is one other point I would like to make.

Some of the agencies have pointed out that so few, percentagewise, requests come from the press. In some agencies, it is only 10 percent; 90 percent come from other persons.

Senator HATCH. Most of them indicate that.

Mr. WIEGHART. What you should know in connection with that—from my own experience here in Washington and from members of my bureau who have made requests—we have found that in the past 4 or 5 years the necessity of invoking the Freedom of Information Act has been greatly reduced.

We call an agency. Most of them, by the way, are cooperating very well—like the Department of the Army—and they just give it to us, so we do not file a request.

Senator HATCH. They volunteer, because they know they are going to have to release information anyway.

The FBI reports that it received over 137 requests from one imprisoned felon who was accused of operating as a Mafia hitman. In fact, the same criminal is pressing a 35-count suit against the FBI.

By the way, the FBI reports that other felons have amassed more requests than this individual.

With the possibility that any slip by an FBI reviewer could reveal an informant to this dangerous man and with an awareness of the greater cost to the Government to aid his search for information, can we say that this is a proper use of the act? Would there

really be any great damage done to the public's right to know if this man could no longer employ the act?

Mr. WIEGHART. I think that is something that the committee should consider.

Again, my own problem with it is just theoretical; and it is this. Since we exclude convicted felons from the normal civil rights the rest of us enjoy, including the right to vote, I suppose it could be drafted carefully. As a practical matter, the difficulty would be that he might be able to obtain this same information through a freedom of information request by a third party.

Senator HATCH. Does it bother you at all that some of the allegations are that foreigners are among those making the most requests for documents from our Federal Government, a number of whom may be even considered to be antithetical to the best interests of this country?

Mr. WIEGHART. Having worked in this city so long, I cannot imagine, for instance, that the KGB would really spend much effort on this. There is so much information, and it is so easily obtained in this city.

For them with their resources and their penetration in various areas of our national life, that I do not think I would add that to the threat.

The Freedom of Information Act, as written, does make it available to anybody.

Again, I think the same problem of enforcement would apply.

Let us say that we excluded foreign nationals from taking access to the Freedom of Information Act. I suppose they could hire an American law firm or an individual friend could file an application. I would not want you to believe that there would be a way practically to keep foreigners from indirectly utilizing the Freedom of Information Act if it was so legislated to prohibit them.

Senator HATCH. Thank you, Mr. Wieghart.

Again, I want to commend you for your testimony.

You have certainly represented your point of view, I think, with vigor and with intelligence.

Mr. WIEGHART. Thank you, sir.

Senator HATCH. We appreciate having had you with us today.

[The prepared statement of Mr. Wieghart follows:]

Prepared Statement of James Wieghart

I am pleased to testify today before this subcomittee on pending legislation to amend the Freedom of Information Act. As Washington Bureau Chief for the New York Daily News between 1974-81, I frequently used the FOIA as a reportorial tool. I am currently Executive Editor of the New York Daily News and, thus, I am speaking on behalf of the American Society of Newspaper Editors.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Pending before Congress are proposals that would drastically limit the types of information available to journalists and other requestors under the Freedom of Information Act. These proposals would provide blanket exemptions to the CIA, the FBI, and other federal law enforcement agencies, as well as exempting virtually all information supplied by business concerns to the federal government. Although this statement will focus on the proposals relating to the FBI and the CIA, a few observations will be made initially concerning the proposals relating to information supplied to federal agencies by business concerns.

Exemption 4 of the FOIA currently exempts from disclosure under the Act of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[1/] Notwithstanding this exemption, spokesmen for business interests have claimed that the FOIA can be used as a tool whereby an actual or potential competitor can unearth sensitive business and financial information. In response, Senator Dole's bill proposes to broaden exemption 7 to cover "proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained."[2/]

1/ 5 U.S.C. § 552(b)(7) (1976).

2/ S. 1247, 97th Cong., 1st Sess. § 4(b) (May 21, 1981).

Claims for the necessity of additional protection for confidential business information should be carefully scrutinzed. Proponents of broadening exemption 7 have cited statements in business magazines counselling the use of the FOIA to gain a competitive advantage, but have been unable to cite a single instance of competitive injury resulting from an FOIA disclosure.[3/] Indeed, a recent study by Professor Russell B. Stevenson Jr. of the George Washington University Law Center concluded that businesses have failed to prove a need for broader protection in this regard and that even were commercial secrets to be released under the FOIA, a claim yet to be documented, release of commercial secrets has only rarely caused "meaningful competitive injury."[4/]

Even if some need for broader protection could be demonstrated, the proposed exemption is incontestably broader than any conceivable need for additional protection could justify. By exempting "information which would not be customarily disclosed to the public," the exemption covers virtually all information turned over to the federal government by business enterprises other than, of course, promotional and advertising material, regardless of whether that

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3/ See, e.g., Oversight of the Administration of the Federal Freedom of Information Act, Hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 98 (1980) (Statement of Thomas J. Houser, National Association of Manufacturers).

4/ Business Week, August 3, 1981, at 25.

information would have an competitive impact. Accordingly, even though under the current exemption the Consumer Product Safety Commission was required to disclose information obtained from television manufacturers concerning accidents that occurred during the operation of television receivers,[5/] under the proposed exemption that publicly important information would remain concealed. Obviously, television manufacturers do not customarily give defective product information to the public. Similarly, information concerning the compliance of business with federal environmental, antidiscrimination, and safety laws would be shielded from public scrutiny. Indeed, it is difficult to think of any information turned over to the government by business enterprises which is also customarily provided to the public.

Also of concern to ASNE are those proposals that would exempt the FBI and CIA, in whole or in part, from the disclosure obligations imposed by the Act. For example, S. 1273 would in effect provide a blanket exemption to the CIA. This bill would amend the Central Intelligence Act of 1949[6/] so that "information in files maintained by an intelligence agency" would be exempt from the disclosure obligations imposed by the FOIA "if such files have been specifically

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5/ Access Reports, July 26, 1977.

6/ 50 U.S.C. §§ 403 et seq. (1976).

designated by the Director of Central Intelligence to be concerned with . . . special activities and foreign intelligence, counterintelligence, or counter-terrorism operations."[7/] No definition is provided for the term "special activities." Presumably, this term could refer to all activites of the CIA other than foreign intelligence activities. Thus, the Director of the CIA can shield all CIA files from disclosure simply by designating them as being concerned with "special activities."

Senator Hatch's proposed bill, S. 587, would provide an equally broad exemption to the FBI and other federal law enforcement agencies, thereby virtually exempting such agencies from the disclosure obligations imposed by the FOIA. That bill would impose a ten-year moratorium on the release of "any records maintained, collected, or used for law enforcement purposes which pertain to a law enforcement investigation."[8/] Thus, notwithstanding that a record may not disclose the identity of a confidential source or satisfy other of the prerequisites for exemption under the existing Act, the law enforcement agency has carte blanche to withhold the information until ten years after the termination of the investigation.

7/ S. 1273, 97th Cong., 1st Sess. § 2 (1981).

8/ S. 587, 97th Cong., 1st Sess. § 7(b) (Feb. 26, 1981).

In addition to this blanket exemption, the bill broadens the exemptions that would be available to justify withholding the information even after the expiration of the ten-year period. For example, exemption 7 would be amended to permit withholding of records which would "disclose information relating to . . . any conspiratorial activity specified by the Attorney General."[9/] Nothing in the Act specifies the procedures to be used for this designation or otherwise defines the circumstances in which such a designation could be made. Thus, under Senator Hatch's bill the Attorney General could, theoretically, block disclosure of agency records by finding, retroactively to the FOIA request, that the records relate to two or more suspects and that those suspects might have been engaged in conspiratorial activity.

Proponents of such amendments have conjured up images of FBI and CIA disclosures which allegedly endanger national security, make foreign governments hesitant to provide sensitive information to the U.S. Government, and endanger the lives of FBI informants and impede the law enforcement obligations of the FBI. These same proponents, however, have so far been unable to cite one single example where any FOIA disclosure by either the FBI or CIA resulted in any of these harmful consequences. This is not surprising since the

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9/ Id. at § 7(a).

FOIA, as currently written, provides substantial protection to the undeniably important interests of national security and effective law enforcement.

For example, consider the protections accorded the CIA. Exemption 1 exempts information "specifically authorized under an Executive order to be kept secret in the interest of national security or foreign policy," that is, all classified information.[10/] An Executive Order permits the classification of material as "Confidential," if its unauthorized disclosure could "reasonably be expected to cause damage to national security."[11/] Exemption 3 also provides significant protection to the CIA.[12/] That exemption, which exempts information specifically exempted by another statute, has been consistently construed by the court as referring to section 102(d)(3) of the National Security Act, which provides:

> That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.[13/]

Accordingly, this exemption has been given an extremely wide scope in order to provide legitimate protection

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10/ 5 U.S.C. § 552(b)(1) (1976).

11/ Executive Order 11652, § 1(C).

12/ 5 U.S.C. § 552(b)(3) (1976).

13/ 50 U.S.C. § 403(d)(3) (1976).

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to the proper functioning of the CIA. Recently, for example, the D.C. Circuit Court of Appeals upheld the CIA's denial of a journalist's request for documents detailing legal bills and fee agreements with private attorneys retained by the CIA.[14/] The CIA was permitted to withhold all information about fees, including total amounts paid, notwithstanding that the identity of any of the retained attorneys would not be disclosed. The fact that payment of a large fee might enable a trained analyst to use that information in conjunction with other information to draw some conclusion about the size, nature and extent of American intelligence operations was sufficient to convince the court that the information could be withheld. The Court stated:

> The Agency's general rationale for refusing to disclose rates and total fees paid to attorneys is that such information could give leads to information about covert activities that constitute intelligence methods. For example, if a large legal bill is incurred in a covert operation, a trained intelligence analyst could reason from the size of the legal bill to the size and the nature of the operation. This scenario raises a reasonable possibility of harm to the covert activity following from disclosure of the size of legal fees. We note that the CIA's showing of potential harm here is not so great as its showing concerning attorneys names. We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle,

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14/ Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980).

> may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction.

Id. at 150. Similarly, this exemption protects not only the names of CIA sources, but also the nature and type of information supplied[15/] and, indeed, even whether responsive documents exist.[16/]

Given the breadth of the exemption accorded the CIA, it is reasonable to suppose that the CIA is not shovelling out mounds of information unwillingly as a result of FOIA requests by the Soviet Embassy or by foreign agents, as some of the proponents of a blanket exemption for the CIA have appeared to suggest.[17/] Indeed, at the 1980 ASNE Convention, then director of the CIA Admiral Stansfield Turner stated: "Thus far, we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released." Admittedly, information which should be kept secret is occasionally made public, but as was made clear by Hodding Carter, a former Assistant Secretary of State who was

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15/ Weissman v. CIA, 565 F.2d 692, 694 (D.C. Cir. 1977).

16/ Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

17/ Remarks of Edward C. Schmults, Deputy Attorney General of the United States, Before the Second Circuit Judicial Conference (Department of Justice Release, May 9, 1981).

in charge of State Department FOIA responses, such information is made public "invariably in ways which have nothing to do with" the FOIA.[18/]

The situation is the same with the FBI and other federal criminal law enforcement agencies. Exemption 7 permits the FBI to withhold information compiled for law enforcement purposes if that information was obtained from a confidential source, would interfere with enforcement proceedings or would disclose investigative techniques or procedures.[19/] Courts construing this exception have held that a "confidential source" may include local, state, and foreign law enforcement agencies.[20/] The seventh exemption in fact represents efforts by Congress during the 1974 FOIA amendments to provide protection to confidential sources in order to prevent those sources from refusing to cooperate with law enforcement agencies, the very protection now claimed necessary by the FBI.[21/]

18/ Hodding Carter III, "Less Freedom of Information Means Less Freedom," Wall Street Journal 25 (May 28, 1981).

19/ 5 U.S.C. § 552(d)(7) (1976).

20/ Keeney v. FBI, 630 F.2d 114, 119 (2d Cir. 1980); Church of Scientology v. Department of Justice, 612 F.2d 417, 420 (9th Cir. 1979); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978).

21/ See House Subcommittee on Gov't Information and Individual Rights, Freedom of Information Act and Amendments of

Footnote continued on next page

In addition to the protections provided by Exemption 7, the FBI has made extensive use of what Carl Stern, a journalist and lawyer with extensive FOIA experience, calls the tenth exemption -- the "We Don't Want To Give It To You" Exemption. Simply by recalcitrance and foot-dragging, the FBI is ordinarily able to achieve what cannot be accomplished through invocation of the nine express exemptions. One technique employed frequently by the FBI is to produce documents that have been rendered virtually useless by extensive and indiscriminate deletions. A recent visitor to the FOIA processing division at the FBI reports a sign prominently posted on the wall in that office: "When In Doubt, Black It Out."

Alternatively, the FBI can delay production for years by citing processing backlogs and then later forcing the requestor into a time-consuming and expensive court battle. A recent case provides an excellent illustration.22/ There,

(Footnote continued)

1974 (P.L. 93-502), 94th Cong., 1st Sess. (Joint Comm. Print 1975). For example, Senator Byrd in his floor remarks in debate to override the presidential veto of the amendments stated:

> I was deeply concerned that without [the] protection [provided by the current version of Exemption 7], law enforcement agencies would be faced with a "drying-up" of their sources of information and their criminal investigative work would be seriously impaired.

Id. at 468.

22/ Keeney v. FBI, 630 F.2d 114 (2d Cir. 1980).

a college student requested his FBI files on July 27, 1975. No action was taken by the Bureau, even after the filing of an administrative appeal until the requestor filed a court action almost one and a half years later. The FBI then released 80 pages with "substantial excisions."[23/] In 1978, the district court required the FBI to produce more information, but the FBI appealed. Not until September 1980, more than five years after the initial request, was the appeal terminated and the FBI forced to turn over the improperly deleted information.[24/] And, of course, from a journalist's perspective, delay is tantamount to denial.

However, the most effective technique the FBI uses for invoking the tenth exemption is simply to claim that too much time and administrative expense would be involved in segregating exempt from non-exempt portions of requested documents. The recent experience of James Reston, Jr., during his efforts to research his book on the Jonestown tragedy is telling.[25/] As is well known, during the eighteen months preceding the mass suicide, Jim Jones taped his nightly sessions with the members of the People's Temple. Approximately one thousand hours of these tapes had been delivered into the

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23/ Id. at 116.

24/ Id. at 120.

25/ James Reston, Jr., The Jonestown Papers, 184 New Republic 16.

custody of the FBI in San Francisco. The FBI consistently denied access to all of these tapes and every document in its possession on the ground that an active criminal investigation into a possible criminal conspiracy to kill Congressman Leo Ryan was in progress.[26/] When requested to segregate and disclose those tapes and documents irrelevant to the investigation, the FBI claimed that it would involve too much time and administrative expense.[27/]

Reston ultimately obtained some of these materials but not through the FOIA. In February 1980, Attorney General Civiletti, after a personal appeal from Reston, rejected the recommendations of the FBI and directed that a compromise be worked out. Once the FBI was forced to consider seriously which tapes should be withheld, the FBI released to Reston all but 25 of the 971 tapes in its possession.[28/] The results of Reston's research was used in his recently published and informative book on the Jonestown tragedy.[29/] The CIA never even bothered to respond to Reston's FOIA request to that agency.[30/]

26/ Id. at 16.

27/ Id.

28/ Id. at 17.

29/ J. Reston, Our Father Who Art in Hell: The Life and Death of Jim Jones (1981).

30/ 187 New Republic at 17.

Given the broad exemption accorded the FBI, and the ease with which the FBI can avoid disclosure, it is difficult to imagine that the FBI is indiscriminately revealing informants' names after FOIA requests by organized crime. Even though Deputy Attorney General Schmults asserts that "organized crime figures" have used the Act, he frankly concedes that "the FBI believes that disclosure of records under the Act has not yet led to physical retaliation against a confidential source."[31/] Indeed, this is the result of the careful legislative scheme worked out by Congress in 1974 to protect confidential sources and to prevent those sources from becoming unwilling to deal with the FBI. Moreover, it is difficult to imagine how this interest is any better pursued by such proposals as a ten-year moratorium on disclosure of all law enforcement records and a complete exemption for records of investigations into any conspiratorial activity.[32/]

Although the dangers to national security and law enforcement cited by advocates of a blanket exemption for the CIA, FBI, and other law enforcement agencies turn out upon analysis to be illusory, the dangers to representative democracy posed by shielding any political institution completely from any and all public scrutiny are very real.

31/ Remarks of Edward C. Schmults, Deputy Attorney General, Before the Second Circuit Judicial Conference 5-6 (Department of Justice Release, May 9, 1981).

32/ S. 587, 97th Cong., 1st Sess. § 7 (February 2, 1981).

The FOIA rests ultimately on the principle that the government of this country -- unlike governments of totalitarian regimes -- represents, and is accountable to, the people. Despite the considerable impediments which already exist, serious and responsible journalists have been able to force disclosure under the FOIA of misgovernment, maladministration, and abuse of legal authority. FOIA disclosures by the CIA have revealed that the agency engaged in domestic surveillance activities with respect to political dissidents[33/] and that the CIA had engaged in drug experiments using unconsenting subjects.[34/] An FOIA request forced the FBI to reveal that the Bureau maintained for fifteen years a counterintelligence program (COINTELPRO) designed to undermine and discredit political dissidents.[35/] Such disclosures have had no conceivable effect upon the legitimate national security functions of the CIA or law enforcement functions by the FBI; rather, these disclosures have revealed improper, possibly unlawful, and certainly embarrasing conduct by both agencies. This is precisely the sort of information which, in a system of government such as ours, should be made public.

33/ New York Times, March 9, 1979.

34/ Washington Star, July 20, 1977.

35/ New York Times, November 22, 1977.

In sum, it is imperative that Congress carefully and critically consider proposals to exempt the FBI and CIA from the requirements of the FOIA as well as to shield from disclosure information supplied by business enterprises. The Act, as it currently stands, has been precisely drafted in order to protect fully all legitimate interests in national security, law enforcement and business confidentiality. As a result, it cannot be seriously claimed that the Act has resulted in a compromise of those interests as a result of forced disclosure of information which should have remained confidential. Instead, what appears to be involved is a frontal attack on the principle of an open government which underlies the FOIA. The words of James Madison bear consideration in this respect:

> A popular government, without popular information, or the means of acquiring it, is but the prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

Senator HATCH. Our next witness is Katherine A. Meyer, director of the Freedom of Information Clearinghouse.

Ms. Meyer is a graduate of the Catholic University Law School. She has practiced privately in Washington, D.C., and has been with the FOIA Clearinghouse for 2 years.

She is a frequent lecturer on the Freedom of Information Act and wrote a chapter on the law enforcement exemption in the book, "Litigation Under the Federal Freedom of Information Act and Privacy Act."

Your published articles and experience as a litigator with FOIA should provide some excellent background on the impact of FOIA on law enforcement, so we are certainly interested in what you have to say, Ms. Meyer.

STATEMENT OF KATHERINE A. MEYER, DIRECTOR, FREEDOM OF INFORMATION CLEARINGHOUSE

Ms. MEYER. Thank you, Mr. Chairman.

And thank you for the opportunity to testify about the Freedom of Information Act.

The Freedom of Information Clearinghouse with which I am an attorney and also the director assists the public and the press in the effective use of the FOIA and other open Government laws. We have also litigated approximately 75 cases under the FOIA.

We believe that the FOIA has proven to be an effective tool for holding the Government accountable to the people, disclosing Government waste and wrongdoing, and keeping the public informed on important matters of health and safety.

We, therefore, urge this committee to move cautiously and on the basis of an informed record before taking any action that would restrict the public's right of access to Government records.

My written statement which I would like to submit for the record focuses primarily on S. 587, which would significantly amend the FOIA, both procedurally and substantively.

I want to make some very brief comments about the FOIA in general and particularly about the argument that there is a need for greater protection for law enforcement records.

The law enforcement records exemption, No. 7, of the FOIA was amended in 1974 to do away with a blanket exemption for all records placed in an investigatory file by a law enforcement agency or any other agency and to require an agency wishing to claim the protection of that exemption to specify one of six harms that would result from disclosure of the information—for instance, invasion of privacy, interference with an on-going law enforcement proceeding, and the identification of a confidential source.

What I want to make clear today is that we do not necessarily think those six enumerated harms are etched in stone. Certainly if the law enforcement community can show a legitimate need for further protection, we are willing to provide whatever assistance we can to fashion an appropriate remedy. In fact, we certainly would like to be included in that process.

For example, we do not have any objection to amending the present exemption 7(D) to allow agencies to withhold information which would tend to identify a confidential source, rather than just information which would reveal a confidential source, although we

would suggest that the language be brought in line with the national security cases to provide that the information must reasonably be expected to identify a confidential source.

We have no objection to amending exemption 7 to provide an agency with the authority to withhold information which if disclosed would endanger the life or physical safety of an individual. Certainly if their privacy is worthy of protection, so are their lives.

However, what we do object to is giving the FBI or any other law enforcement agency a virtual wholesale exemption from the act, either by excluding the agency altogether from the act's requirements or placing a moratorium on the disclosure of their records for 3 years, 10 years, or whatever period of time.

We have heard no evidence or policy arguments to date to justify such drastic measures. This committee should be wary of such an unreasonable approach to amending such significant legislation.

We strongly believe that no agency is above accountability to the public, and that our Government has been strengthened over the last 7 years by virtue of having opened up its performance to the light of public scrutiny.

Public accountability is a vital cornerstone to our democratic society. Indeed, it was the very lack of such accountability for so many years that allowed the Watergate environment of special favors, illegal burglaries, domestic spying, interference with first-amendment rights, destruction of records, and similar abuses of power to fester in this country.

It is absolutely essential that we maintain the fine balance of accountability that we have achieved in order to prevent such abuses from recurring in the future.

I have one final comment that I would like to make now, in addition to everything that I have put forth in my written statement.

That is that we vigorously oppose further restricting plaintiff's rights to participate in FOIA litigation. For instance, what S. 587 would do would be to require courts to receive in camera—in secret—the affidavits submitted by an agency in support of its claims that particular documents are exempt under either exemptions 1, 3, or 7.

Plaintiffs are already at a significant disadvantage in litigating FOIA cases by virtue of the fact that they do not know what the contents of the documents are, unlike the agency they are litigating against.

To require courts to maintain the agency's affidavits—basically their briefs in support of their arguments that the documents are exempt—in secret, would virtually exclude plaintiffs from participating in the litigation.

I cite in my written statement an example of a recent case that we lost in the District Court for the District of Columbia involving data that the Food and Drug Administration has collected pursuant to its investigation of the Eli Lilly Co., for unlawfully suppressing adverse drug reaction data on Darvon, one of the leading prescription drugs in this country.

The plaintiff in that case, Mr. Campbell, whom I represent, was employed by Lilly for 15 years before he was fired for bringing to the attention of the officials certain instances of the company

suppressing data that reflected unfavorably on Darvon and showed that it was an unsafe drug, and other drugs as well.

He was discharged, and he wanted to bring a civil action against the company for that retaliatory discharge. He put in an FOIA request to the Food and Drug Administration which had started its own investigation of his charges, seeking all of the information that Lilly had submitted to the FDA during the course of that investigation.

You had a situation where the Government knew what the information was. Eli Lilly knew what the information was. Plaintiff was the only one who did not know what the information was.

The court allowed the Food and Drug Administration, under a claim of exemption 7, where the agency was claiming that disclosure of the information would somehow interfere with its enforcement proceeding, even though Eli Lilly by virtue of having submitted the information, knew exactly what the FDA had on it, to conduct the litigation in secret.

I was not even informed of the secret proceeding until I went to a status call one day, and the court informed me that the agency had submitted certain documents in camera and certain affidavits in camera, and that the court had made a preliminary determination that the agency had met its burden of proof. Lo and behold we lost that case.

I just want to stress that Congress should not condone that kind of secret proceeding. That provision of S. 587 would do just that.

That kind of proceeding runs counter to our notions of fairness and our traditional adversary process.

In addition to submitting our written statement, I would like to reserve the opportunity to present further testimony in the fall when the administration submits its own package of amendments. I am perfectly willing to answer any questions you might have.

Senator HATCH. That would be fine.

You stated that the FOI Clearinghouse litigates more cases under FOIA than any other organization. Would you tell us how many cases that amounts to and what kind of organizations or people do you represent the most? What are the costs and who pays the costs?

Ms. MEYER. I think it is about 75 to 80 cases that we have litigated under the FOIA in our 9 years of operation.

Our organization is a part of Ralph Nader's Center for the Study of Responsive Law. That is where we get our funding. We do not take fees from our clients. Our clients are primarily other public interest organizations and members of the press—I have represented Carl Stern, for example, in a number of cases—journalists and historians, and those kinds of requesters.

Senator HATCH. Is that number 80 the number of cases you have brought to conclusion or have you filed more than that?

Ms. MEYER. That is the number of cases which have been filed.

Senator HATCH. That have been totally filed?

Ms. MEYER. That have been litigated at all.

A lot of those cases were settled prior to a court judgment.

Senator HATCH. If you do not take fees from clients, who pays your costs?

Ms. MEYER. The cost of the operation of the organization is funded by the Center for the Study of Responsive Law, which is Ralph Nader's organization which receives funding from private personal contributions—publications of books, lecture fees, and so forth.

The clearinghouse also makes available a pamphlet on how to use the FOIA, for which we charge 25 cents or something. We distribute thousands of those a year. That kind of funding.

Senator HATCH. Certainly you are aware of the special problems agencies like the CIA have in processing requests that require going through sensitive material. They must go through the compartmentalized filing system and then have experts who are intimately familiar with the documents and closely scrutinize them to delete sensitive information.

The FBI, too, has sensitive information in its files that must be carefully examined so that critical investigations are not disrupted by the disclosure of confidential information.

Yet you have called for speeding the review process by having lower level employees, most of whom would lack critical experience and familiarity with your varied files, be the sole reviewers.

Would you speed review at the risk of compromising vital information?

Ms. MEYER. Certainly not.

I think in my testimony I qualified that statement by saying that there is no reason why most agencies cannot train their low-level personnel.

Certainly I recognize that there are certain sensitive problems with the national security agencies, and even with the FBI, in having low-level personnel making decisions about disclosures.

I do think that overall the agencies would fare much better, in terms of cutting back on delay and consequently the costs of administering the act, if they spent some more time training their personnel on how to process an FOIA request.

Senator HATCH. Thank you so much for appearing. We appreciate having your testimony.

Ms. MEYER. Thank you, Senator.

[The prepared statement of Ms. Meyer follows:]

Prepared Statement of Katherine A. Meyer

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify about the Freedom of Information Act and S. 587, which would significantly amend the Act both procedurally and substantively. I am an attorney and the Director of the Freedom of Information Clearinghouse, which was established in 1972 as part of Ralph Nader's Center for the Study of Responsive Law. In its nine years of operation, the Clearinghouse has assisted the public and press in the effective use of the various open-government laws, including the FOIA, the Privacy Act, the Government in the Sunshine Act and the Federal Advisory Committee Act. Clearinghouse attorneys have also litigated more cases under the FOIA than any other organization.

Since its enactment, and particularly since the 1974 amendments which considerably strengthened the Act, the FOIA has proven to be an invaluable tool for holding the government accountable to the people, disclosing government waste and wrongdoing, and keeping the public informed on important health and safety matters. For example, through the FOIA the public has learned about discriminatory practices in the administration of federal contracts programs; major medicare frauds by private health organizations; defective and unsafe consumer products; and unsafe and ineffective drugs and medical devices. We have also learned much about serious abuses of power by our intelligence and law enforcement agencies, including mind-control and drug testing experiments

on unwitting subjects, surveillance and harassment of persons in an effort to disrupt and discredit various political movements and to silence political dissent, and manipulation of the press. It is because the FOIA has proved to be such a valuable "check" on our government and because freedom of information is a vital cornerstone of any free democratic society, that we urge you to move cautiously in taking any action which would restrict the public's ability to know what its government is doing.

We are fully aware that the FOIA has been criticized in recent years both by federal agencies and the entities they regulate, and that there may be some legitimate problems with some aspects of its current structure and administration. However, S. 587, with all due respect, represents nothing short of overkill in addressing these problems, and would substantially cut back on the public's ability to scrutinize the workings of the government. Rather than present an exhaustive analysis of the bill's many provisions today, I request the opportunity to present more specific comments when these hearings are recommenced in the fall, at which time we would have the opportunity to testify about the proposals in S. 587 in conjunction with the Administration's own package of amendments which we understand will be issued sometime in September. My testimony instead will focus on the more significant, and in our view, wholly unnecessary, provisions of S. 587.

A. Time to Respond

Section 2 of the bill would amend the FOIA to provide an agency up to a full year to notify a requester of its initial intention to comply with a request for information. This proposed extension of the deadlines for processing a

request is unjustified and would serve only to sharply decrease the effectiveness of the Act. Indeed, agency delay in processing FOIA requests is already the single greatest obstacle to effective use of the Act. This is particularly true for the news media, for which timely access to government information is absolutely crucial to keeping the public informed on matters of current and wide public concern.

I am currently representing a journalist who requested information from the CIA over two and a half years ago concerning the assassination of Congressman Leo J. Ryan and the mass murders and suicides of 900 American citizens in Jonestown, Guyana on November 18, 1978. McGehee v. CIA, Civ. No. 80-2997 (D.D.C. filed Nov. 21, 1980). As Mr. McGehee's affidavit (copy attached) painstakingly demonstrates, he was subjected to a bureaucratic run-around for almost two years during which the CIA not only delayed processing his request, but also refused to provide him with any indication of when it would be processed. Only after a court action was brought, and the agency was directed by a federal district judge to process the request, did the agency disclose any information at all together with its justification for withholding most of the documents. Furthermore, this was not a situation where the request involved voluminous records. After two and a half years, the CIA claims it can identify only 56 documents which are responsive to the request. The delay in this case is particularly egregious considering Mr. McGehee's status as a journalist and the fact that Mr. McGehee had several relatives, including a three year old nephew, who died at Jonestown. There is simply no justifiable reason why his efforts to shed light on these events, including the unprecedented murder of a Congressman on a fact finding mission to another country,

should be stymied by the CIA's dilatory practices. Section 2 of S. 587 will only condone and increase such delay.

I want to stress that this is not an isolated incidents. It is not uncommon for requesters to wait months and in some cases even years to obtain information which should be readily accessible to the public. The Act already provides ample flexibility for meeting the present time limits where the request involves voluminous records or requires consultation with other offices or agencies. It is also beyond dispute that as a practical matter requesters invariably afford agencies much more time for a substantive response than the Act currently allows, if only to avoid the costs and additional delays entailed in unnecessary litigation. The Act also provides that courts can allow additional time for processing a request where the agency can demonstrate an excessive backlog of requests and that it is exercising due diligence in responding to a particular request. 5 U.S.C. § 552(a)(6)(c). See Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

In our view the answer to the delay problem lies not in giving the agencies more time to respond to requests, but primarily in more efficient organization and use of agency recources and personnel. To begin with, there should be a uniform policy establishing priority processing for FOIA requests, calling for the abandonment of the first in/first out approach currently in use. It should be replaced by a policy giving first priority to requests for information of immediate public concern. For example, requests from the media should ordinarily take precedence over requests from individuals and business entities seeking information for their own personal use. Similarly, limited requests for information should be identified and handled quickly, rather

than set aside while the agency processes more voluminous requests. At the same time, requesters of large amounts of information should be notified within the ten day time limit of the approximate time it will take the agency to process the request so that the requester can decide whether to narrow the request or specify the information needed immediately.

A substantial amount of search time could be eliminated if the agencies were to improve their record-keeping and indexing practices. Often times a requester is told that either the request cannot be processed at all or that it will take an indefinite period of time simply because the information cannot be identified in the agency's files on the basis of the description contained in the request. This presents a particular dilemma for historians and researchers who want information concerning a particular subject matter but have no idea how to key their requests to the filing system employed by the agency. The problem can best be dealt with by maintaining a centralized indexing system with extensive cross-referencing, so that the desired records can easily be pulled. In the alternative, the agency should at a minimum inform requesters of its system of indexing and assist them in reformulating their requests accordingly.

We agree with a recent report of the Subcommittee on Administrative Practice and Procedure, that a major contributor to delay in processing requests is the use of unnecessary review levels. We have found that for many agencies, although it takes only one agency employee to deny a request for information, it takes numerous employees, and often senior officials of the agency, to approve the release of information. Given the overriding purpose of the 1974 amendments to increase the effective use of the FOIA, this

situation should be reversed. There is simply no reason why most agencies cannot train low level personnel in the appropriate application of the exemptions and authorize them to release non-exempt material. As the Subcommittee report reasoned,

> [i]n short, the greater the number of agency employees who have authority to grant an initial information request, and the fewer the number who have authority to deny a request, the less processing delay there is likely to be. Such organizational structures are also much more in keeping with the maximum disclosure philosophy of the FOIA.

Agency Implementation of the 1974 Amendments to the Freedom of Information Act, Report by the Staff of the Subcommittee on Administrative Practice and Procedure, Senate Comm. on Judiciary, 95th Cong., 2d Sess. 70 (1980).

Given the realities of how the present time limits actually work, these limits should be maintained, not extended. Requesters must be able to seek judicial review of an agency's withholding without first exhausting a year's worth of administrative remedies. Indeed, we would propose that the FOIA be amended to provide that a requester who can demonstrate both a compelling need for immediate access to records and that the agency will not process the request within the present time limits may seek judicial review before the expiration of the time limits. This would enable requesters with an urgent need to obtain information, such as journalists meeting a deadline, to seek immediate judicial scrutiny of an agency's withholding. Where the requester could not make the necessary showing of compelling need and agency delay, the court could dismiss the action for want of jurisdiction pending exhaustion of administrative remedies.

B. Administrative Costs

Sections 8 and 9 of S. 587 are apparently aimed at easing the administrative costs associated with the FOIA.

Section 8 would relieve the agency of having to produce information already available in another public forum, limit a person to one request per agency per year on any general subject, and allow an agency to refer a requester to the agency where a document originated if the document was submitted to the recipient agency on a non-confidential basis. Section 9 would amend the fee provision of the Act to provide that each requester shall be charged a fixed fee of $10 plus duplication costs and that fees will be waived only upon a showing of "financial hardship."

We have no objection to making it clear that in the interests of efficiency, an agency may refer a requester to the originating agency for access to a particular document, as long as any such provision also makes it clear that the referral will not delay the process or unduly burden the requester. The McGehee case mentioned earlier is illustrative of this concern. After two and a half years and a court directive, the CIA finally processed Mr. McGehee's request, only to inform him that with respect to one third of the documents in the CIA's files, he would have to look to the State Department and FBI where the documents originated. However, since Mr. McGehee had not dealt with either of those agencies, he was told he had not exhausted his administrative remedies with them, and he had not joined them as defendants in his pending lawsuit. In our view it is unconscionable for an agency to delay processing a request far beyond the time limits and then to claim that the requester must start over exhausting administrative remedies with another agency. Indeed, the Act already provides an agency additional time for responding to a request where needed to consult with another agency having a substantial interest in the determination of the request. 552(a)(6)(B)(iii).

As to the other provisions of sections 8 and 9, we believe that not only would they needlessly restrict the public's right of access under the FOIA, but they simply do not go to the heart of the concern about costs. The problem is not the result of numerous requests by a single requester. Nor is it caused by the requirement that fees be waived under the current standard where the information will primarily benefit the general public. Indeed, a recent study for the Administative Conference of the United States concluded that only one to two percent of all FOIA rquests involve requests for fee waivers.* Rather, the problem with costs stems from the agencies' inability to recoup the full costs of processing requests and to channel collected fees into their own operating budgets. The Act presently provides that a requester can only be charged fees for search and copying. However, as Jonathan Rose, Assistant Attorney General, recently testified in the House, by far that most significant agency cost is represented by the personnel time devoted to reviewing requested material to determine whether an exemption applies and segregating exempt from non-exempt material. Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy Before the Subcommittee on Government Information and Individual Rights, House Committee on Government Operations at 18 (July 15, 1981). We agree with Mr. Rose that agencies should be authorized to charge fees for this expense where the requester is seeking information for a private commercial or financial interest. Id.

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* "Public Interest Fee Waivers Under the Freedom of Information Act," A Report to the Administrative Conference of the United States, by John E. Bonine (November 7, 1980).

We also strongly recommend that the monies generated through the collection of processing fees be put back into the operating budget of the particular agency rather than placed in the funds of the general Treasury which is the current practice. Since it is a generally acknowledged fact that overwhelmingly the greatest users of the FOIA are corporations, we estimate that more than two-thirds of the annual government exenditures for administering the Act could be recovered this way and reapplied to assist effective use of the law by the public for whom it was intended.

Some additional comments on the subject of costs are in order. We have heard much about how the costs of administering the FOIA are too high and how the burden of complying with the FOIA is deleterious to the public interest because it takes agency time and resources away from more important government activities. We strongly disagree with these claims. First, we believe there is no more important function of a democratic society than its dedication to an informed citizenry. The benefits of the FOIA have far outweighed its costs. The FOIA has uncovered waste, mismanagement, and abuse of power which threatened the very core of our democratic government. While is would certainly be a lot less expensive for the taxpayers if we lived under a totalitarian regime where the government told us only what it wanted us to know, such notions are anathema to our principles of freedom and independence. Second, we have not seen any useful statistical analyses of the true costs of administering the Act, including the very real costs of bureaucratic run-around, multiple layers of review, inefficient record-keeping, unnecessary litigation, and an unwillingness to settle attorney fees claims at current market values.

C. Law Enforcement and National Security Provisions

The remainder of my testimony will address the various provisions of S. 587 which to a large extent would enable agencies performing law enforcement functions to escape public scrutiny. As a preliminary matter, it must be emphasized that no government agency, regardless of its function, should be placed above accountability to the American public. Indeed, it was the very lack of accountability for so many years on the part of such agencies as the FBI and IRS that allowed the "Watergate" environment of special favors, illegal burglaries, domestic syping, interference with the exercise of First Amendment Rights, destruction of records, and other abuses of power to fester. As these abuses have come to light over the past years, largely through the FOIA, the media, and congressional oversight, we have produced a better government.

It is not enough to say that these abuses are now behind us. That is not the issue. Whether they are or not remains to be seen. And if the abuses are behind us, we have only openness in government to thank. We must maintain that openness to assure that past abuses do not recur and that new ones can be checked in time. While concededly such openness may make the job of law enforcement more difficult in this country, that is a necessary consequence of a democratic society which places the right of the individual above the rights of society as a whole. A far greater danger to our way of life than inefficient law enforcement is a government that operates in secrecy.

Congress weighed all of these concerns in 1974 when it amended Exemption 7, dealing with law enforcement records. It rejected a blanket exemption for any document placed in a file designated "investigatory" by an agency, in

favor of a provision requiring the agency to demonstrate first that a document is an investigatory record compiled for a legitimate law enforcement purpose, and second, that disclosure would result in one of six enumerated harms. Those six harms cover virtually every concern for confidentiality we have heard expressed by the law enforcement community: interference with ongoing proceedings; deprivation of a right to a fair trial; personal privacy; confidential sources and all information provided solely by a confidential source; investigative techniques and procedures; and endangering the life or physical safety of law enforcement personnel. In the absence of any concrete evidence that the exemption is inadequate to protect these interests, further expansion of the scope of protection for law enforcement records is unwarranted and would only jeopardize the careful balance of accountability we have achieved.

I will now turn to the specific provisions of S. 587.

Section 4 would add three new exemptions to the FOIA. The first would exempt rosters of law enforcement and national intelligence personnel. The National Security Agency and CIA are already authorized by statutes qualifying under exemption 3 of the FOIA to withhold from the public the names, official titles, and even numbers of personnel employed by them, 50 U.S.C. §§ 402(d), 403(g). No further protection is needed. As employers of public agencies, law enforcement personnel have no legitimate privacy right to keep their names confidential. To the extent the exemption is intended to protect personnel involved in a particular investigation from potential retaliation, exemption 7(F) should be adequate for this purpose.

The second new exemption would exempt training manuals, investigative handbooks, and manuals dealing with investigative technologies. Exemption 7(E) already protects invstigative

techniques and procedures used in the course of a particular investigation. Any further protection for investigative techniques should be tempered by the public's need to check abusive or unconstitutional tactics and by the FOIA's abomination for "secret law." See Jordan v. Department of Justice, 591 F.2d 753 (1978)(en banc).

The third new exemption would keep secret any information received on a confidential basis from a foreign government or from a state or local government agency. We see absolutely no justification for this sweeping exemption. Foreign government information is already protected from disclosure under the national security exemption and Executive Order 12065. Exemption 7 adequately protects sensitive information received from a state or local government where disclosure would interfere with an enforcement proceeding, reveal a source, or invade a person's privacy. As written, the proposed exemption would encompass virtually all dealings between local governments and federal agencies and thereby eviscerate the public's right to monitor its government's performance.

Section 6 of S. 587 would require a court reviewing a law enforcement or intelligence agency withholding to examine the contents of the document in camera and to maintain any affidavit received under seal. This section is entirely unnecessary and runs counter to our traditional adversary system of litigation. The FOIA already provides a reviewing court the authority to examine documents in camera, 5 U.S.C. § 552(a)(4)(B), and where an agency is unable to justify its withholding on the public record because such justification would itself reveal exempt information, such as in national security cases, courts have also allowed the submission of in camera affidavits. See

e.g., Haden v. Nat'l Security Agency, 608 F.2d 1381 (D.C. Cir. 1979); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). However, to require the court to review in camera all affidavits submitted by an agency claiming the protection of exemptions 1, 3, or 7 would essentially deprive FOIA litigants of the ability to participate in the litigation. Plaintiffs are already at a substantial disadvantage in FOIA cases since, unlike the defendant agencies, they do not know the contents of the documents over which they are litigating. Ex parte in camera proceedings compound that disadvantage, and create an imbalanced and inadequate record upon which the court conducts its de novo review.

We recently lost a case in the district court because the Court allowed the Food and Drug Administation to engage in such secret litigation. Campbell v. Dept. of HHS, Civ. No. 80-2996 (D.D.C. July 21, 1981)(appeal pending). The case involved documents relating to an FDA investigation of the Eli Lilly Company for unlawfully suppressing evidence reflecting on the health risks associated with three drugs, including darvon, one of the leading prescription drugs in this country. Mr. Campbell had been employed by Lilly for fifteen years before being fired for reporting to Lilly that certain company officials had unlawfully suppressed the adverse data. He later brought his charges to the FDA which initiated an extensive investigation of the matter. To obtain evidence for use in his civil action for retaliatory discharge, Mr. Campbell requested access under the FOIA to all information submitted to the agency by Lilly in the course of the investigation. The documents were denied in their entirety under a claim that disclosure would interfere with the FDA's investigation, even though Lilly had supplied

the FDA with the very information requested. Plaintiff was denied any discovery, and the Court allowed the FDA to submit its affidavits in support of its argument in camera. In fact, plaintiff's counsel was not even informed of this secret proceeding until after the Court had examined the affidavits and made a preliminary determination that the government had met its burden of proof. Plaintiff's counsel were then denied the opportunity to review the in camera affidavits even though they were willing to do so under a strict protective order prohibiting them from disclosing the contents of the affidavits to anyone, including the plaintiff. Since plaintiff's counsel were denied discovery, as well as the opportunity to even know the precise basis for the government's claims, it is not surprising that, in the absence of any adversary testing, the court ruled in the government's favor. This case did not involve national security or other comparably sensitive information. Indeed, the government never came forward with a single reason why plaintiff's counsel could not review the FDA's in camera affidavits. This was secret litigation, plain and simple. It is abhorrent to our traditions of fairness and the adversary process and should not be condoned, let alone expanded, by Congress.

Section 7 of S. 587 contains a number of proposed amendments to exemption 7. We do not have any strong objections to changing the language of subparagraph D to protect information which would "tend" to identify, rather than actually reveal, a confidential source, since as a practical matter courts interpret the exemption in the broader sense any way. Although we suggest that the language be changed to protect information which "could reasonably be expected to identify" such a source, the same

standard used in the national security context. However, we do not believe that state or local governments (as opposed to individual informants reporting to them) should qualify under any circumstances as "confidential sources." Furthermore, we do not object to amending subparagraph F of the exemption to provide protection for information which if disclosed would endanger the life or physical safety of any person.

We do have strong objections to proposed subparagraph G which would protect information relating to any investigation of any conspiratorial activity specified by the Attorney General. This provision is much too sweeping in scope. A conspiratorial activity can be any activity, whether lawful or not, involving two or more persons. During the Nixon presidency, anti-war protestors, civil rights workers, and other political organizations were deemed to be engaging in conspiratorial activity worthy of active campaigns of surveillance, disruption, and discrediting by the FBI and IRS. The proposed amendment would render the only lesson of Watergate to be "don't get caught."

Finally, section 7 would include a new provision of the FOIA prohibiting law enforcement agencies from disclosing any records which pertain to a law enforcement investigation for a minimum of ten years after an investigation not resulting in prosecution is terminated, and for an even longer period where the investigation results in prosecution. This provision would amount to a wholesale exemption for all law enforcement records. It is unfounded, unjustified and an affront to the principle of government accountability. If this exemption had been in effect, much of the information about Watergate, recently exposed political corruption by state and federal officials, Vice President Agnew's resig-

nation, and numerous other dark chapters in our recent history would still be unavailable to the public. Moreover, the provision is written so broadly that it would encompass any investigation undertaken to enforce any law. Consequently, since most regulatory agencies have law enforcement responsibilities, the public would be deprived of information about unsafe automobiles and drugs, chemical waste dumps, radioactive spills, violations of the securities, anti-trust and civil rights laws, and countless other activities that affect our daily lives. This provision is absolutely intolerable in a free society.

* * *

In conclusion, we urge this Committee to reject all pleas to cutback on the public's right of access to government records in the absence of tangible evidence that that right is outweighed by an even greater governmental interest in secrecy that is not adequately protected by the existing FOIA. Where actual problems exist, we are more than willing to address them head-on and to engage in meaningful dialogue with all concerned to fashion effective solutions. To this end, we look forward to assisting this Committee in the future.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIELDING M. McGEHEE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 80-2997
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	

AFFIDAVIT OF FIELDING M. McGEHEE III
SUBMITTED PURSUANT TO RULE 56(f) FED. R. CIV. P.

1. I am a free-lance journalist and the plaintiff in this action.

2. Several of my relatives died at Jonestown, Guyana as a result of the mass murders and suicides of some 900 American citizens which took place on November 18 and 19, 1978.

3. By letter dated December 6, 1978 (Exhibit A), I requested access under the Freedom of Information Act ("FOIA") to Central Intelligence Agency ("CIA") documents relating to the following:

(1) The Peoples Temple which was founded in Indianapolis in the 1960's and which had subsequent addresses in Ukiah, Redwood Valley, and San Francisco, California, and Jonestown, Guyana;

(2) The Agricultural Project, a Peoples Temple Agricultural Project, in Jonestown, Guyana;

(3) Jonestown, Guyana;

(4) The late Rev. James Jones, minister of the Peoples Temple;

(5) The late Carolyn Moore Layton, who died in Jonestown on November 19, 1978 and who has been described by several newspapers as the coordinator of the Peoples Temple in Rev. Jones' absence;

(6) Information on Peoples Temple "defectors," "hit squads," and "assassination teams."

4. By letter dated December 21, 1978 from George Owens, CIA Information and Privacy Coordinator (Exhibit B), I was notified that my FOIA request had been received and

that processing of the request would begin upon the CIA's receipt of my agreement to bear the search and copying fees involved. Mr. Owens' letter also informed me that the likelihood of the CIA's locating any significant amount of material was remote.

5. On or about January 10, 1979, I called the CIA about my FOIA request, and was referred to a Mr. Rochester. Mr. Rochester advised me that in all likelihood my request would be processed more quickly and still result in the identification of most of the documents I was seeking if I simply asked for documents concerning the Peoples Temple, and that searches for records under other headings would most likely not turn up any responsive documents. Upon that advice, and wishing to cooperate in any way that would expedite consideration of my request, I narrowed my request to the category of documents specified in item # 1 of my December 6, 1978 letter. I also told Mr. Rochester that I was willing to pay the necessary processing fees.

6. Sometime in late March, 1979, I called the CIA to check on the status of my request. I spoke with Mr. Rochester, who informed me that although there was information about the Peoples Temple in the CIA's files, my request was still pending. Mr. Rochester also informed me that approximately 695-700 FOIA requests were ahead of mine in the order of requests to be processed.

7. Not having received a substantive reply to my FOIA request, sometime in late July, 1979, I again called the CIA to check on the status of my request and was given no indication of when I could expect responsive materials.

8. On or about October 26, 1979, I called the CIA for a status check. I spoke to Mr. Rochester who told me that my request was currently being processed and that the records were being examined. In a letter dated the same day, I also informed Mr. Rochester that I had changed my address and that all correspondence should be sent to my new address.

9. On or about February 28, 1980 I called the CIA to ascertain why I still had not received a substantive reply to my request. I was informed that Mr. Rochester, with whom I had been dealing, was no longer with the agency. I was referred to a woman identified only as "Frieda," who informed me that the processing of my request had not even begun and that she could give me absolutely no indication, not even the year, when I might expect a response to my request.

10. On or about February 29, 1980 I called "Frieda" at the CIA, who told me that 550 FOIA requests had priority over mine and that all requests for information concerning the Peoples Temple had been lumped together, meaning that once one of those requests was processed, all the other requesters for the same information would receive a response from the agency.

11. By letter dated March 4, 1980, to ensure that I would receive any information concerning the Peoples Temple that might have already been released to someone else, I requested copies of any records released by the CIA pursuant to any request for information on the Peoples Temple.

12. By letter dated March 20, 1980, the CIA stated that no information had yet been released by the agency regarding the Peoples Temple.

13. In the early part of June, 1980, I called "Frieda" at the CIA for a status check on my request. Once again, I was told I could be given no indication of when the processing of my request would begin.

14. During the month of June, 1980, I contacted my Congressman, Tom Daschle, to ask for his assistance in finding out when my FOIA request would be processed. By letter dated June 19, 1980, I was informed by Congressman Daschle that he had contacted the agency on my behalf, but that he was given no indication of when my request would be processed.

15. By letter dated October 23, 1980, my counsel formally appealed the CIA's almost two-year delay in responding to my request. (Exhibit C).

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16. By letter dated October 31, 1980 my counsel was informed that the CIA had not processed my request and that it was unable to indicate when the request would be processed.

17. This action was filed November 21, 1980 requesting the Court to order the CIA to complete processing of my request and to make the requested information available to me.

18. The first time I received any information from the CIA identifying documents responsive to my FOIA request was through my counsel, who was provided an index of 56 of the 84 documents on May 5, 1981 pursuant to an order of the Court. At the same time, my counsel was provided with copies of 12 documents in their entirety and 18 documents from which portions had been deleted.

19. By letter dated June 2, 1981 from the State Department (Exhibit D) and sent to my old address, I was given copies of 14 additional documents in their entirety, portions of seven other documents, and told an additional six responsive documents were being withheld in their entirety.[1] Various exemptions were claimed for withholding the six documents in their entirety and portions of the seven documents released in part.

20. I do not believe that the CIA has conducted a thorough and complete search of its files to identify all documents in its possession which are responsive to my request.

21. I base my belief that the CIA's search for responsive documents has been inadequate, inter alia, on the following facts:

(1) The CIA failed to specify by affidavit that it has conducted a thorough and complete search of its files for documents responsive to my December 6, 1978 FOIA request, and, in particular, failed to specify the nature, scope and manner of its search and to identify the personnel responsible for conducting the search;

(2) The CIA has conceded before this Court that it has not searched all of its files which may contain responsive documents (see Defendant's Memorandum in Support of its Motion for Summary Judgment at note 2);

(3) I was advised by the CIA to narrow my original request for information, which I now believe may have resulted in a less than thorough search for all responsive document;

(4) Certain documents released to me in whole or in part reference other documents which appear to be in the CIA's possession and responsive to my request, but which have not been identified by the agency as responsive documents. Specifically, I refer to the document designated "DO Document No. 28" which mentions a "file on the Rev. Jimmie Jones" compiled by the Office of Security, and to the document designated "OPA Document No. 1" which mentions a "Factbook" concerning the Peoples Temple. The CIA knew these documents existed on December 5, 1978, the date of DO Document # 28, which was before my FOIA request was filed. This leads me to believe that all statements by the CIA in response to my request, especially Mr. Owens' letter of December 21, 1978 and Mr. Rochester's more specific representations on or about January 10, 1979 that searches for records under headings other than "Peoples Temple" would most likely turn up no records, were misleading.

(5) In testimony before a Subcommittee of the House of Representatives, Joe Holsinger, former administrative assistant to the late Representative Leo J. Ryan who was assassinated in Guyana on November 18, 1978, allegedly by a Peoples Temple member, testified that a CIA agent was present at the assassination of Congressman Ryan; that the CIA was engaged in covert operations in Guyana involving Jim Jones and the Peoples Temple; and that the CIA withheld information from Congressman Ryan concerning the living conditions in Jonestown. Hearings Before the Subcommittee on Foreign Affairs, 96th Cong., 2d Sess. 7-15 (February 20, 1980). (A copy of Mr. Holsinger's testimony is attached as Exhibit E).

(6) The CIA refused to give me any indication whatsoever of when my FOIA request would be processed and it failed to process my request for almost two years, forcing me to bring an action in this Court in order to have my request processed. I was given contradictory information at different times by various CIA personnel regarding whether or not the processing of my request had even begun. The CIA has also recently insisted that with respect to six of the responsive documents that have not been disclosed to me, and the information deleted from seven others, I must now seek relief from the State Department, which is not a party to this action and which claims that I have not exhausted my administrative remedies for access to the withheld information, and from the Federal Bureau of Investigation which also is not a party to this action and with which I have had no contact regarding this matter. All of these circumstances indicate to me that the agency has acted in bad faith in processing my FOIA request, that it has been begrudging in every respect with regard to searching for and identifying responsive documents, and that it has obstructed my right of access under the FOIA.

22. I do not believe that the CIA has met its burden of proving that it has conducted a thorough and complete search for all responsive documents to my FOIA request and that it has identified all such responsive documents. However, I am unable to assert on the basis of personal knowledge all of

the facts necessary to support this belief without the opportunity to obtain responses to my second set of Interrogatories and Document Production Request which seek to obtain information bearing on the nature, scope and manner of the CIA's search for responsive documents.

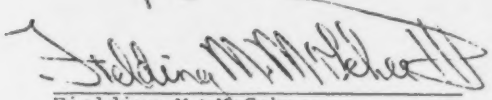
23. Nor do I believe that the CIA has met its burden of proving that the documents it has identified and withheld in their entirety and the deleted portions of other documents are exempt from disclosure under exemptions 1 and 3 of the FOIA because they constitute "intelligence sources." However, I am unable to assert on the basis of personal knowledge all of the facts necessary to show that the CIA's withholding is improper under exemptions 1 and 3 without the opportunity to obtain responses to my second set of Interrogatories and Document Production Request. Specifically, through this discovery, I have sought to ascertain whether the withheld information was obtained pursuant to the CIA's guarantee of confidentiality, whether any such guarantees were necessary to obtain the withheld information, and why the CIA needs this particular information to perform its intelligence functions effectively. I have also sought to ascertain whether the CIA made a determination that the public interest in disclosure of the withheld information was outweighed by the need to keep the information secret, pursuant to Executive Order 12065 (Sec. 3-303).

24. Furthermore, I do not believe that the CIA has met its burden of proving that the documents and information withheld from me, and which it has referred to the State Department and Federal Bureau of Investigation, are exempt from disclosure under the FOIA. However, without a detailed itemization of those documents and portions thereof, together with a detailed justification for the agency's claims of exemption for each document or portion, I am unable to advocate my position that the information must be disclosed.

25. I believe that the public's interest in knowing the underlying circumstances and reasons for the tragic murders and suicides of 900 Americans in a foreign country and the unprecedented murder of a Congressman on a fact-finding mission on behalf of his constituents far outweighs any need on the part of the CIA to keep the documents I have requested secret.

26. The foregoing assertions are true and accurate to the best of my knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 8, 1981.



Fielding M. McGehee

Senator HATCH. Our next witness is Robert Nesoff, the national representative for the Federal Criminal Investigators Association, a professional association for all Federal special agents involved in domestic law enforcement.

Mr. Nesoff is a former newspaperman for the Newark News and is president of the North Jersey Press Association.

He also writes a nationally syndicated column.

With impressive credentials in both the fields of law enforcement and journalism, your perspective on these questions surrounding the Freedom of Information Act, I think, will be particularly valuable to the committee.

We are very grateful for your taking the time to come in and chat with us.

STATEMENT OF ROBERT NESOFF, NATIONAL REPRESENTATIVE, FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION

Mr. NESOFF. Thank you, Senator.

I am speaking today on behalf of the Federal Criminal Investigators Association.

I would like to take a moment and thank you for the opportunity to present the views of the FCIA on these critical and important matters.

The recent atmosphere in Washington, in treating our intelligence services and their special agents as adversaries whose every word must be suspect, has obviously come to an end. In its place, we simply ask for an attitude of concern, interest, and an opportunity to present our point of view for your consideration before you weigh all input and make an independent decision.

That such an atmosphere exists today is evident in the witness list and the courtesy with which our representatives have been welcomed in the offices of yourself, Mr. Thurmond, and Mr. DeConcini.

The members of the Federal Criminal Investigators Association are in full accord with the intent and purposes of the Freedom of Information and Privacy Acts. Our members believe that a free society must enjoy a free press and not fear Government dossiers on their personal lives.

The same public, however, has a right to enjoy a life free of harm from criminals and terrorists. It is in this area that the concerns of freedom clash, although it should not be so. Rather, it should be very compatible.

The need for Government investigative agencies to collect and amass certain information free of scrutiny by the general public is in line with the Constitution and the concept of a free people.

To recount the litany of horror stories created by misuse of the FOIA/PA—such as organized crime elements, uncovering informants, narcotics users obtaining detailed information on how to process drugs, convicts receiving investigation records while they are still in prison, and convicts requesting training manuals from the FBI—need not be gone into in minute detail here.

Previous testimony that we furnished before the Senate Subcommittee on Intergovernmental Relations of the Senate Government Affairs Committee, chaired by Mr. Sasser, might be of interest to you for this background information.

What we are concerned with today is how to stop the abuses that have been generated by the FOIA/PA bills. Both bills have been enforced for a number of years now, and their warts have become visible.

Law enforcement officials at all levels have reported that the proliferation of access and privacy laws were instrumental in creating a restrictive climate which affects their ability to obtain information from the public and institutions to recruit and maintain informants and to exchange information with other law enforcement agencies.

The need to recruit confidential informants and protect their identities, the need to show such informants that their identities will never be compromised, is nowhere more graphically demonstrated than in the incident involving a newspaper informant, known today as Deep Throat, who provided background information for the Watergate exposé.

The Washington Post would argue for the need to protect such an identity, pointing out that they could not obtain informants otherwise. We fully agree.

We find it incongruous that journalists argue against the Government's obligation to develop and protect informants. Neither the Washington Post nor the FBI could obtain critical information unless the provider could be totally assured that his identity would remain forever a secret.

Without strict controls on the information from such Government files being released to the public, it is not difficult for criminal elements to determine who such informants are.

The original legislation in an attempt to make Government more open and responsive to the people has at the same time impaired society's ability to protect itself.

Television news operations maintain files not used in actual news broadcasts. Print reporters similarly record reams of information in their notebooks that will never see the light of print.

This is necessary to make a value judgment about what will be used in the actual news story, what will be banked for future investigation, and what may not be relevant at all.

The media has steadfastly fought against making such filed information known to Government agencies and law enforcement, contending that it is confidential and must be protected.

Yet the same media cannot bring itself to understand that in the course of an investigation, a great deal of information is gathered—some critical and pertinent—other details superfluous.

While it fights to protect its own background and file information, it fights with equal vigor to force open investigative files of various intelligence agencies for its own benefits.

Forcing investigative agencies to disclose or destroy certain file information may inhibit future investigations.

A subcommittee was told: "Information about members of criminal groups at every level is essential to effective law enforcement today, tomorrow, and even years from now. A low-level member of a syndicate today may be tomorrow's upper echelon leader."

After placing severe restriction on intelligence agencies, former President Carter complained publicly that they had not provided him with proper information. His comments and actions are tanta-

mount to castrating a stud bull and then complaining that it is not doing its job.

I would like now to address specific sections of the proposed amendment to the current legislation.

On section 4: FCIA opposes in the strongest terms the release of any roster of names of special agents or criminal investigators. Release of such names may not only render such agents ineffective in their work, but it could also render them dead and place their families, as well, in danger from criminal and terrorist groups.

It was only last year that a New Hampshire newspaper, preparing an article on Federal employees working in that State, was provided a comprehensive list of every criminal and intelligence agent working there.

Only through the intervention of the Federal Criminal Investigators Association and the cooperation of that newspaper's editor, were the critical names deleted. The same list, obtained in the same manner by other parties, could have endangered both investigations and lives.

FCIA, likewise, supports a total prohibition against providing anyone with confidential law enforcement training manuals. There is no need for the Government to provide a step-by-step outline of how its agents will proceed so that criminals and terrorist elements can devise methods to avoid them.

This section will also, once again, permit cooperation between Federal and local agencies.

In California, the IRS/CID was expelled from the law enforcement information network because years of work would have been compromised under FOIA.

Los Angeles police also deleted several Federal agencies from their information flow, because they could not guarantee confidentiality.

Section 5: The provision of information to foreign nations, except on a case-by-case basis without proper safeguards, sets a dangerous precedent that is virtually unknown in any other country in the world.

Section 6: FCIA is in full accord with the requirement for in camera court proceedings and the maintaining of confidentiality and sealing of any records deemed to be of such a confidential nature during the course of any judicial proceeding.

In New Jersey some years back—and I believe one of the gentlemen involved in this case was from or now is with Mr. Wieghart's newspaper—a pair of enterprising reporters wrote a book using trial transcripts of wire taps conducted during an investigation of organized crime. The court neglected to seal the transcripts, making them public information and revealing all the details the investigating agencies had expected would remain confidential.

The proposed ban on release of information collected during a law enforcement investigation for 10 years is a step in the right direction. The time lapse period should be increased to 15 years to add greater protection to informants and confidential sources. We are not concerned here with a statute of limitations for lawsuits but rather the protection of lives.

Section 10: This section limits the provision of criminal information on prospective employees to prospective employers concerned with national security or hospitals where drugs may be available.

This does not take into consideration the fact that a person convicted of a fraud or embezzlement may be applying to a stockbroker for a job or a bank robber seeking employment as a teller.

A criminal conviction should be totally available to legitimate inquiry as a means of prohibiting such felons from having free access to the means of committing similar crimes.

The simple fact of a criminal conviction, excluding misdemeanors, must mean that the criminal has forfeited his right of total privacy in the greater interests of the community.

Section 11: This section is tantamount to telling someone that he cannot use the telephone until the installation of a tap has been completed.

Premature disclosure of an investigation by revealing an individual's file to him or informing him that an investigation is underway will not only place that investigation in jeopardy but will also endanger the agents conducting the investigation.

Mr. Chairman, that concludes my formal statement. If I may provide anything additional, I would be happy to do that.

Senator HATCH. Thank you so much. We appreciate your statement and the efforts you have put forth through the years that I have been here.

Why are State and local government agencies more reluctant to share enforcement intelligence with Federal agencies?

Mr. NESOFF. I have named two reasons in this statement—California, in general, and the Los Angeles Police Department. There are also similar incidents in Detroit and a number of other locations throughout the country.

Once the information that the local networks have provided or have gathered is provided to a Federal agency, it then becomes subject to the Federal FOI laws.

It may then become compromised if someone suspects that an investigation is being conducted against him and applies to the Federal Government or that particular agency for information or background material under FOIA.

Senator HATCH. How does the reduced flow of law enforcement intelligence affect investigations of organized crime?

Mr. NESOFF. It does not affect it; it stops it.

Senator HATCH. So that is the effect.

Give us your reasons why that is so.

Mr. NESOFF. As any investigative newspaper reporter knows, you do not just suddenly wake up one morning and say: My goodness, I think I will investigate such and such.

Probably about 99.9 percent of all good solid investigative stories come from a tip or somebody who has suggested that you look into something or a good solid confidential informant.

Law enforcement works pretty much the same way—a reason to suspect that something is amiss somewhere is given to an agency or an agent and an investigation is begun that way.

Without this confidentiality and without an informant knowing that his identity will be totally protected, most of these cases cannot be started, much less brought to a conclusion.

I would refer, again, to the Deep Throat incident in the Watergate case. From all that we apparently know about it, this is where the bulk of the information came from which got them started. If this particular individual had had any suspicion that his identity would be exposed, I am sure the two gentlemen who prepared that story would never have gotten the critical material that they needed.

Senator HATCH. Are you aware of specific examples of informants being disclosed as the result of a FOIA request or of a potential informant refusing to cooperate as a result of fear of disclosure through FOIA?

Mr. NESOFF. I have some information relating to that. It would be rather difficult to pull it out of the report that I have right now. I will make a copy of that report available to your committee.

Senator HATCH. Without objection, that will be made a part of this record.

In 1980, a Federal court ordered the release of a roster of Federal customs officers. That was *Lesar* v. *Department of Justice,* 636 F.2d 472.

What effect has this had, or might it have in the future, on Federal law enforcement?

Mr. NESOFF. The publication of a list of the officers?

I am not familiar with that particular case. I can relate it to the instant case that I mentioned in New Hampshire which occurred about 7 or 8 months ago.

The newspaper was conducting a legitimate inquiry as to what Federal employees were living in the State. They were trying to show a relationship between the income of the Federal employees and the depressed areas of the State.

Along with the list of clerical and administrative employees, a comprehensive list of every special agent and every intelligence agent and every criminal agent working or living in New Hampshire was also furnished to the newspaper.

Several of our people became aware of it. One of our representatives, John McIrney, contacted the newspaper immediately. Through very, very close cooperation with the editor, the names were deleted.

Had these names been printed, it would have compromised immediately the identity of every agent living or working in the State.

A number of these were working undercover. If their identities had been disclosed, it would have immediately destroyed the cases they were working on and could very well have cost them their lives as well.

Senator HATCH. We sure appreciate your coming in. As usual, your remarks are well put, I think.

Mr. NESOFF. Thank you very much, Senator. As always, we remain available to you for whatever additional help we may be able to give.

Senator HATCH. Thank you. We really appreciate that.

[Additional information submitted by Mr. Nesoff follows:]

The Negative Impact of the Freedom of Information Act and Privacy Act on Law Enforcement Agencies

(By Bob Nesoff)

The Right to Privacy and openness of government is an issue that has grown in the past 10 years. Prompted by publications of illegal and unethical practices by government officials and accelerated by the Watergate revelations and Pentagon Papers, numerous books and articles on the subject have been published. Citizens fear that the government's secrecy can only lead to abuse. Furthermore a government that can perform surveillances; compel individuals to furnish information; collect, disseminate and exchange information; and a society which maintains files such as public school transcripts, college admission and progress records, motor vehicle bureau records, employment records, social security records, life insurance records, income tax returns, professional and trade licensing records, pension records, military files, arrest records, prison records, mental health records, welfare records, traffic violator records all has created a distrust among its citizens that this proliferation of records is not sufficiently controlled to protect individual privacy.

Thus, with this background, Congress enacted the Freedom of Information Act, herein abbreviated as FOIA, in 1974. This Act created public access to Federal Government records, except for information specifically exempt.[1]

In addition, Congress enacted the Privacy Act, PA, of 1974 which emphasizes protecting an individual's personal privacy; listed procedures to enable people to obtain their own files; and furnished a descriptive list of its records systems.[2] The tax reform act of 1976 was also an outgrowth of the citizen's cry for privacy and limits dissemination of tax returns and taxpayer information for non-tax related matters.[3]

Many states have enacted their own openness laws to provide public access to State government records and activities and privacy laws to regulate the collection and dissemination of information by State agencies and by private organizations. New York State enacted its own Freedom of Information Law September 1, 1974 and a Sunshine Act which allows for openness in executive meetings.[4]

However, Congress was unable to realize the numerous difficulties and problems created by the passage and implementation of these laws. Prof. Arthur Miller, Harvard Law School, advised in New York Times article dated April 12, 1978 that "There will be an inexorable clash between the rights of the individuals to privacy and the First Amendment guarantee of a free press." [5]

Another article from the New York Times described a legal challenge between the Priest and Penitent confidentiality.[6] Neither was Congress prepared for the numerous and sometimes ridiculous requests made under the FOI/PA.

The largest area of controversy exists in the citizen's right to privacy vs. his right to be secure. The citizen's right to know vs. government's secrecy. Although voluminous literature has been written concerning the citizen's right to privacy, very little has been written reflecting Law Enforcement officials' attitude pertaining to the inapplicability of the acts. In this same regard, very little has been written reflecting Law Enforcement officials' concerned opinions as to their inability to protect the public under the auspices of the POI/PA. Nor has there been literature published concerning the many opportunities the FOI/PA offers criminal elements to impede ongoing criminal investigations and intelligence operations.

Congressional Hearings were conducted from 1975–78 concerning this area of dispute. As a result of these hearings, Law Enforcement officials at all levels of government stated that the proliferation of access and privacy laws has been instrumental in creating a restrictive climate which affects their ability to obtain information from the public and institutions, to recruit and maintain informants and to exchange information with other law enforcement agencies.[7]

It is the intent of this paper to explore the problems that the FOI/PA and Tax Reform Act of 1976 have created within the Law Enforcement Agencies. The basis of this paper are the published summary reports of the Senate Subcommittee on

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[1]FOIA, U.S. Code 552, enacted July 4, 1966 and amended by Congress 1974, effective February 19, 1975.

[2]Privacy Act, Public Law 93–579. 93rd Congress S. 3413 Dec. 31, 1974.

[3]Tax Reform Act, Oct. 4, 1976. Public Law 94–445.

[4]Freedom of Information Law—Miniguide to the New York State Law, Pub. NYSS Ba/ Journal, January 1975.

[5]New York Times, "Right to Privacy vs. Right to Know", Apr. 12, 1978, p. B12.

[6]New York Times, "Priest and Penitent Legality Issue", Sept. 3, 1977, p. 20.

[7]Report by the Comptroller General, United States, "Impact of FOI/PA on Law Enforcement Agencies", Nov. 15, 1978, p. 1.

Criminal Laws and Procedures dealing with "The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security" and the report by the Comptroller General of the United States entitled "Impact of the FOI/PA on Law Enforcement Agencies". The problem areas assert themselves not only in criminal investigations but also intelligence gathering and national security investigations. It is not my intent to argue for the abolition of the FOI/PA because they all contain positive merit. The theme of this paper is to illustrate that acts furthering the privacy revolution should be implemented with an understanding that they should not interfere with the public's right to be secure; that a full understanding of the impact and mechanics of the FOI/PA should be undertaken before implementation. This paper intends to present a posture that the Congress in its attempt to secure an individual's right to privacy has impaired society's ability to defend itself from the individuals who would destroy it. The FOI/PA and its accompanying satellite acts may have dangerously weakened the government's ability to protect the individual and the country.

It is obvious that the FOI/PA and the Tax Reform Act is not the only factor responsible for the regressive climate towards law enforcement investigations and intelligence gathering. However, this report will only deal with the negative impact the FOI/PA has caused the Law Enforcement Agencies.

IMPAIRMENT OF LAW ENFORCEMENT OPERATIONS

In conducting criminal investigations, all pertinent facts of a case must be obtained, developed and analyzed before a conclusion can be drawn. While conducting a criminal investigation, the gathering of facts phase is developed through witnesses, informants, surveillances and institutions such as banks. These facts are recorded and maintained for future investigations.

Law Enforcement Agencies have asserted that criminal investigations and intelligence operations have been inhibited and eroded by the FOI/PA. Generally they believe the Acts (1) are a financial and administrative burden, (2) inhibit their ability to collect information, and (3) diminish the quality and quantity of information exchanged with other law enforcement agencies. These three categories will be examined later in this report.[8]

Law Enforcement Intelligence can best be defined from this excerpt by Mary C. Lawton, Deputy Assistant Attorney General.

"Intelligence gathering involves the collection of information about individuals, their activities and their planned activities, for the purpose of preventing or preparing to deal with threats to fundamental government interest or to individuals whom the government has a special duty to protect." [9]

Mr. John Olszewski, former Director of Intelligence, Internal Revenue Service told the subcommittee:

"Information about members of these criminal groups at every level is essential to effective law enforcement today, tomorrow, and even years from now. A low-level member of a loanshark syndicate in Chicago, Detroit, or New York may be tomorrow's upper echelon syndicate leader in Las Vegas.

"For example, a major racket figure, said to be currently under investigation in the West, 7 years ago was a midlevel strong-arm man in the Midwest. His background, former contacts, and associates are important factors in today's investigation. Unless this background information over the years is maintained—retained—and is legally available, investigations will be unnecessarily prolonged and are likely to be unsuccessful. Thus, it is the public interest which suffers." [10]

It is difficult to quantify the extent of the erosion, however, three years of testimony before the Senate Subcommittee has produced the following:[11]

Intelligence files laboriously built up over decades have in many cases been completely destroyed—i.e., city of Baltimore; city of Pittsburgh; and Washington, D.C.

In other instances, most notably the New York State Police and the Chicago Police Department, the intelligence files have been impounded now for several years.

In many more instances—the New York Police Department and the Los Angeles Police Department are outstanding examples—there has been a massive purge of

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[8] Report by the Comptroller General, U.S., "Impact of the FOI/PA on Law Enforcement Agencies", p. 2 U.S. Government Printing Office.

[9] Report of the Subcommittee on Criminal Laws and Procedures, "The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security", U.S. Government Printing Office.

[10] Ibid, p. 16, Testimony before Subcommittee.

[11] Ibid, p. 37-38.

the files resulting in the elimination of 90 to 98 percent of the information on record.

Intelligence units at State and local levels have been disbanded or reduced to so nominal a strength that they must be considered inoperative.

The gathering of new intelligence—bearing on extremist activity as well as the activities of ordinary criminals—has become far more difficult because law enforcement agencies must now operate under the most severe restrictions governing the use of three of the most effective sources of intelligence: electronic surveillance, undercover agents and informats, and third-party records.

Electronic surveillance in many jurisdictions has become a thing of the past, even where crimes like kidnaping and drug trafficking are involved. The subcommittee was informed that 21 States now prohibit wiretapping under any circumstances, while the laws of most other States restrict its use, even with court approval, to very rare instances.

Third party records—bank records, phone and utility records, credit records, etc.—can only be obtained pursuant to court orders, and in many cases the regulations require that the subject involved be notified of the subpoena and given an opportunity to oppose its implementation.

Law enforcement has suffered its greatest loss, however, in consequence of the dramatic reduction in the number of informants providing it with information. Informants now do not come forward as they used to do, for the simple reason that they fear disclosure of their identities under Federal or State Freedom of Information Acts.

For example, according to testimony before the House Intelligence Committee, as of July 1978 the FBI had a total of 42 informants nationwide covering the entire field of terrorist and extremist groups.

Mr. Glen King, Executive Director of the International Association of Chiefs of Police, estimated that the 17,000 municipal law enforcement agencies in the United States lost between 50 to 75 percent of their total intelligence gathering capabilities.

Mr. Robert Chasen, The U.S. Commissioner of Customs estimated a 40 percent loss.

Mr. H. Stuart Knight, Director, U.S. Secret Service, estimated a 40 to 60 percent loss and advised that their agency receives a greater degree of cooperation than any other law enforcement agency because of the nature of their protection work.

Specific examples of the problems Law Enforcement Agencies have encountered under these Acts are depicted in the following chapters and will serve to illustrate why the percentage of intelligence gatherings has greatly diminished.

Testimony from the Civil Service Commission established that the Civil Service Commission does not ask any applicants, even applicants for sensitive positions, whether they are or have been members of Communist or Nazi or other totalitarian or violence-prone organizations. Nor, in the absence of an overt violation of law, does the Commission make an intelligence entry based on such information, if the information was provided by a third party. The list of organizations mentioned in the course of the questioning was a long one, but far from complete. It included the Communist Party, U.S.A., the KKK, the American Nazi Party, the Maoists, the Trotskyists, the Prairie Fire Organizing Committee which publicly supports the terrorists activities of the Weather Underground, the Puerto Rican Socialist Party which similarly supports and defends the actions of the Puerto Rican terrorists, the Jewish Defense League, and the Palestine Liberation Organization. The same answer apparently applied to all organizations: in the absence of an overt act, "mere membership" is not a bar to Federal employment.[12]

It is important to note that the Department of Defense falls under Civil Service Commission regulations. This led to an incident in which an applicant was not clearable by Army standards, but according to the Civilian Personnel Office, this fact could not be used to bar his employment as a Computer Security Specialist. (The function of a Computer Security Specialist is to protect computers within the Defense Department from hostile penetration.)[13]

FINANCIAL AND ADMINISTRATIVE BURDEN

Citizens are asking for files the government may or may not have on them; for records dealing with assassinations at home and abroad; for the annual report of the Selective Service System; for the famous "Pumpkin Papers" of Alger Hiss; for the Ethel and Julius Rosenberg files; and for the volume of toilet paper provided each year for a government agency. How much is this costing us?

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[12] Ibid, p. 6, testimony Civil Service Commission, Feb. 9, 1978.
[13] Ibid, p. 6.

Karl Grossman in an article entitled "Fee Blocks Your Right To Know" accused the government of requesting too high a fee for obtaining information under FOIA. Grossman stated that "the government purposely requested a high fee in order to make getting information impossibly expensive".[14]

Actually, the cost of administering the Freedom of Information Act, in terms of both money and manpower, is a very expensive proposition and the fee charged is minimal.

Mr. Lawrence Silberman, former Deputy Attorney General, testified before the Senate Subcommittee that the actual cost of implementing the FOIA to the FBI alone for fiscal year 1977 was almost 13 million and that these FOIA requests had taken 375 persons including 50 trained agents, away from other activities.[15] Mr. Quinlan Shea, of the Justice Department, told he subcommittee that 6 percent of the FBI's total personnel complement is working on requests under the FOIA and PA.[16]

In a report of June 16, 1978, GAO noted to the Congressional Subcommittee that 35 agencies reported FOIA costs of 11.8 million in 1975, while 37 agencies reported FOIA costs of 20.8 million in 1976.[17]

The cost factor, however high, does not allow for the experience and skills of highly trained investigators removed from the field of law enforcement to expedite the requests. Obviously, the public must suffer. William E. Williams of the Internal Revenue Service noted that "for the calendar year of 1977, 23,347 hours were contributed by professional employees in IRS field offices—other than specialists in the FOIA area—professionals in the Intelligence Division provided 10,514 hours".[18]

The administrative burden seems even more destructive considering the types of individuals submitting FOI/PA requests. Drug Enforcement Administration (DEA) officials report about 40 percent of its requesters are prisoners asking not only for their own files but also for sensitive information. One convict, while in prison, requested a DEA intelligence brief on the manufacturing of liquid hashish. Although DEA initially denied the request, the Department of Justice overruled DEA and the intelligence brief was sent.[19]

Neither does an individual have to be a citizen of the United States or a resident to obtain information under the FOIA.

An Alcohol, Tobacco & Firearms official advised that about 50 percent of its requests come from prior offenders who use the FOI/PA in an attempt to find out how investigations are conducted and thus avoid capture in future crimes.

Mr. Robert Chasen, U.S. Commissioner of Customs, testified that the Customs Service had to release the names of all Criminal Investigators as well as general investigators to a request from the Women's Division of the ACLU.[20] In other words, the total personnel rosters for the Federal Law Enforcement Agencies are not even exempt under the FOIA. Nor are grade, salary, duty station or position title.

The 90 percent of American people who are honest and have never committed a violation certainly do not benefit from this. Mr. Olzewski, former Director of I.R.S., Intelligence Division, testified that, as the privacy laws stand today, the primary beneficiaries have not been dissenters but mobsters, drug traffickers and other criminal elements.[21] Mr. Williams, Deputy Director of the I.R.S., pointed out that one of the reasons why criminal elements have found it easy to exploit the privacy legislation is that "neither the FOIA nor the Privacy Act require a requestor to provide personal information about himself, nor do they need a justification of such a request."[22]

Utilization of FOIA/Privacy Act by the criminal world was expressed by Mr. Silberman:

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[14] Karl Grossman, "Fee Blocks Your Right To Know", Smithtown News, Oct. 26, 1978, p. 12.
[15] Report of the Subcommittee on Criminal Laws and Procedures, etc. Mr. Lawrence Silberman, testimony before Senate Subcommittee, July 13, 1977, p. 53
[16] Ibid, Mr. Quilan Shea, Director, Office of Privacy & Information Appeals, testimony, Mar. 9, 1978, p. 54
[17] GAO Report, "FOIA and PA Requests and Cost Data," made to Congress, June 16, 1978, U.S. Gov't. Printing Office.
[18] Report of the Subcommittee on Criminal Laws and Procedures, etc. William E. Williams, Deputy Commissioner, IRS, testimony of Apr. 25, 1978, pp. 54-55.
[19] Ibid, Peter Bensinger, Administrator, Drug Enforcement Administration, Department of Justice, testimony of Sept. 21, 1977, p. 56.
[20] Ibid, Robert Chasen, Commissioner of Customs, U.S. Customs Service, testimony of Oct. 15, 1977, p. 57.
[21] Ibid, John Olzewski, former Director of I.R.S., Intelligence Division, testimony of July 13, 1978, p. 63.
[22] Ibid, William E. Williams, Deputy Director, I.R.S., testimony of July 13, 1977, p. 63.

Mr. SILBERMAN. If I may, let me tell you something about the underworld which you will be particularly interested in. The Bureau is enormously concerned because certain techniques have developed to, if I may use the term, to "play" the Freedom of Information Act/Privacy Act on the part of organized crime figures.

Senator HATCH. Does this include foreign espionage agents?

Mr. SILBERMAN. Yes.

Senator HATCH. Would you cover both of them?

Mr. SILBERMAN. Yes. It is a simple technique. Let's suppose that you are the head of a criminal conspiracy and you are concerned about the possibility of informants within your conspiracy—one or more. Therefore, you direct all of them to make Freedom of Information requests for their files.

First that puts the Bureau in a difficult position because they may or may not want to disclose that there is a criminal investigation which would permit an exemption. Suppose they had not started a criminal investigation yet?

Beyond that, there is a separate problem. The informant will not have a file. However, if they respond to everyone and say that the informant does not have a file, that is a dead giveaway that the individual making the request is indeed an informant. In that case, they have to make up a phony file in order to protect his identity. That is tricky.[23]

In addition, criminal violators can use the FOIA to find out what is in their files; can use the Act to extend their cases in court; can use it to suspend or delay penalties already imposed as well as learn the identity of the initiator or complainant of the investigation.

The Tax Reform Act of 1976 placed stringent requirements that the Internal Revenue Service notify, in writing, the taxpayer when a summons is served on a third party record keeper. The taxpayer then has a right to stay compliance of the summons if he/she wishes to furnish the information themself. However, field reports indicate that numerous subjects of criminal inquiry merely stay compliance on each summons in order to delay investigations.[24]

For the period of March 1, 1977 to March 31, 1978 478 I.R.S. summons challenges had been decided by the District Courts in favor of the government and not one single summons case was found in which the court ruled against the I.R.S.[25] Whether a large proportion of the investigations involved organized crime was not indicated. This seems to indicate that the FOIA procedures are not protecting any legitimate interests of the taxpayer. In addition, Disclosure Law requirements have nullified any exchange of information between I.R.S. and Federal and local law enforcement agencies.

It would appear that the 1976 Tax Reform Act interferes with I.R.S.'s ability to investigate criminal violations by extending the time required to perform an investigation. It also seems that other law enforcement agencies are penalized by the inability of I.R.S. to share information through joint task force and strike force operations.

IMPAIRMENT IN INFORMATION GATHERING

Conducting a criminal investigation requires gathering information from numerous sources; among them the general public, informants and institutions. The FOI/PA has impeded the obtaining of information from these sources by its numerous requirements, confusing guidelines and excessive interpretation.

GENERAL PUBLIC

An accurate fear by the general public that cooperation with law enforcement agencies can lead to their identities as well as possible litigation, can, in part, be attributed to the FOI/PA.

Numerous cases have been documented by Federal Law Enforcement Agencies which reflect this general feeling among the public that information furnished by them cannot be maintained in absolute confidentiality. In fact, some agents have openly advised that they cannot guarantee the confidentiality of the information furnished.

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[23] Ibid, Lawrence Silberman, testimony of July 13, 1977.
[24] Tax Reform Act of 1976, Title 26, Section 7609, Internal Revenue Code.
[25] Report of the Subcommittee on Criminal Laws and Procedures, etc., p. 74.

Law Enforcement Agencies have encountered numerous instances in which derogatory information is withheld because of fear of disclosure of identity. Some examples to corroborate this are:

An FBI office reported that the most significant negative impact on its investigative mission has resulted from a $600,000 lawsuit filed against a person, who about 20 years ago, allegedly provided derogatory information to the FBI about the plaintiff's suitability for a government job. The plaintiff had used the FOIA to request FBI files which she claimed allowed her to identify the source of the derogatory information. The plaintiff charged that the information was slanderous and defamatory. The suit was dismissed because the statute of limitations had run out, but the primary issue of whether or not a person can sue someone who has provided information to the FBI was never addressed or resolved. FBI agents reported that members of the general public and law enforcement officers were shocked that such a lawsuit had been filed. Numerous individuals informed FBI agents that, as a result of this lawsuit, they would never provide derogatory information to the FBI.

A recent Department of Justice applicant investigation developed a considerable amount of derogatory information. A U.S. district judge was interviewed, and he admitted that he had information which would bear on the investigation, but he refused to furnish it to the FBI because he said he knew that his information, once released outside the FBI, would not be protected to conceal him as the source of the information. He said other Federal judges felt the same way and believed that the Federal bench in general was unwilling to assist in such background investigations.

In a fraud investigation in a southwestern city, a former employee of the company being investigated, who had been a principal source of information, was fearful that he would be sued by the subjects of the investigation if he provided information to the FBI. He knew this information would be available upon request under the FOI/PA, and if the criminal allegation was not ultimately resolved in court, he would become civilly liable. On several occasions this source expressed reluctance to provide information of value.

The USSS provided the following example of a citizen's reluctance to cooperate. In accordance with a request from the Department of Justice, USSS offices were required to make inquiries regarding the organized crime situation in their respective districts. In connection with this effort, and agent interviewed the Chief Investigator for a County District Attorney's Office, who had considerable background on organized crime activities. When interviewed, he declined to release any information. He stated that, under the FOIA, records and files of Government agencies could be obtained by non-law-enforcement personnel, that much of the information he had could not be positively substatiated, and that he could be liable for making statements he could not fully prove. He further advised that if his identity as a source of information were obtained under the FOIA, he might be subpoenaed before another body to testify on the information he had, possibly compromising his informants.[26]

INFORMANTS

Not enough emphasis can be placed on the importance of developing and obtaining information from informants. In a great portion of criminal investgations, informants play a major role. Critical and sensitive cases are usually initiated and developed through leads obtained from informants.

In cases concerning violent crimes, terrorism, espionage, narcotics or organized crime, the informant becomes an effective investigative tool. The success of utilizing informants depends on one major criteria. The informant must be kept in complete confidentiality. Any press official could readily attest to the necessity of maintaining confidentiality of the informants. (Court decisions have ruled that inherent in the First Amendment is the right for press reporters to keep confidential their sources.) Disclosure of the informant's identity could result in civil litigation, public embarrassment, loss of employment or physical harm. In the category of cases mentioned above, disclosure of the informant's identity would most likely result in death.

Federal officials, as well as the informants themselves, believe the FOI/PA jeopardizes their future. Since the inception of the FOI/PA, informants have been increasingly reluctant to furnish information due to release of information from law enforcement files which could reveal their identity. Agents believe that personnel handling FOI/PA requests, are not 1) acquainted with the investigation, and 2) some don't even have criminal investigative experience. This might cause information to

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[26]Report by the Comptroller General, U.S., "Impact of FOI/PA on Law Enforcement Agencies", 11/15/78, case examples p. 4, 5, 16, U.S. Gov't. Printing Office.

be mistakenly released that reveals the identity of the informant. Others can foresee paperwork getting lost in the shuffle and unintentionally distributed to the wrong individuals. This has led many agents to refuse to recruit new informants or contact old ones because of their inability to guarantee confidentiality. Informants, as much aware of these problems as the agents, are unwilling to furnish information as readily as before. Some case examples.

An informant connected with organized crime provided information in FBI cases, including some which led directly to the identification and prosecution of several Federal violators. Inquiring into a dramatic decrease in his productivity, the FBI learned that he became very circumspect after an organized crime figure requested and received, under the FOIA, a large volume of FBI reports and was undoubtedly trying to identify informants. The informant expects organized crime to make much greater use of the FOI/PA and doubts the FBI's ability to maintain control over the contents of its files.

An informant who was productive for many years in the area of organized crime and who furnished information resulting in numerous convictions became concerned that he might be identified. He indicated that newspaper accounts of FBI information disclosures under FOIA caused him to lose confidence in the FBI's ability to protect his identity. Because he had furnished information over a number of years, he believed it would be possible to identity him from a compilation of this information. The informant is presently in a position to furnish information on a major political corruption case and refuses to do so, stating that the more sensitive the information the more likely it is to "come out".

A former source of excellent quality information was recontacted because his background was such that he could develop information of value concerning a terrorist group. He initially refused to cooperate for fear that through an FOIA disclosure his identity could eventually be revealed. He believed his information would be of such quality that anyone outside of the FBI upon reading it would easily be able to identify him. He was reminded that he had functioned as a valued source for several years and that his identity had never been disclosed. He acknowledged this was true; however, he stated that due to FOIA he no longer believes that FBI agents can assure his complete protection even though they would make every effort to do so. The source also cited recent court cases, particularly the Socialist Workers Party lawsuit, which convinced him that his identity could not be protected. After 3 hours of conversation, the former source agreed to cooperate but only in a very limited way. He made it clear he would never again function as extensively as before because of FOIA, similar laws, and court decisions. He added that disclosure of his identity would most assuredly cost him his life.[27]

INSTITUTIONS

In almost every criminal investigation information must be obtained from at least one institution. Sometimes requests are simply for financial background, other times they are needed immediately to locate a fugitive. Examples of some institutions under the P/A are banks, Federal agencies—non-law enforcement, hospitals and telephone companies. The Privacy Act has seriously decreasd the ability of these institutions to furnish information readily, since the provisions of the Act requires these institutions to exercise extreme caution in freeing information from its files. Failure to do so could result in punitive measures. Since the enactment of the P/A, these institutions require a subpoena before access to information in their files is allowed. In the past, an agent's identification and the respective entry in a chronological cover sheet by the institution was all that was needed.

Furthermore, private organizations not under the P/A have adopted a conservative outlook in allowing access to their files in fear of encouraging an invasion of privacy suits. A great many of these organizations have become administratively confused over when to grant access to their files. They interpret the P/A to include their own organizations even though they are not expressed directly under the P/A.

The interpretation of the P/A as such has led to numerous delays in investigations and in some cases has allowed a fugitive to go unapprehended. The longer the delay in a criminal investigation, the stronger the likelihood witnesses will be missing, witnesses will be coerced, information will disappear, and the statute of limitations will expire. Kidnapping, homicide and fugitive cases all require essential alacrity. The P/A has presented problems in this area. Some examples of Institutions withholding under the provisions of the P/A are the following:

[27] Ibid, case examples p. 6-7.

In a case involving approximately 100 forged checks in a midwestern city, the USSS attempted to develop information on the accounts in which these checks were deposited. Banks refused to furnish copies of documents from three accounts without a subpoena, even though the banks stood to lose a total of $40,000. These banks cited the P/A as a reason for failing to furnish the requested information. Information was provided after subpoenas were served.

During an unlawful flight to avoid prosecution/murder investigation, the FBI found out the nonpublished telephone number where the fugitive would be for the Christmas holiday. The FBI tried to obtain the location of the number from various officials of a midwestern telephone company, but they refused to release the information without a subpoena. As a result, the fugitive was not apprehended.

In a fraud investigation the FBI was denied information submitted to Medicare through an insurance agency. This information showed Medicare fraud perpetrated by the staff of a union-owned hospital and was withheld by the insurance agency because of the P/A. Most of the information desired was ultimately obtained by a Federal grand jury subpoena.[28]

Mr. Donald Wartman, Acting Commissioner of the Social Security Administration, stated in an article in the New York Times on July 5, 1978 that there has been a progressive erosion of his agency's ability to resist requests from Law Enforcement officials in recent years and that although the Social Security Administration prohibits such disclosures, he regularly provides information about an individual without the subject's consent, to a member of Federal and State Agencies.[29]

However, Law Enforcement Agencies have recorded numerous instances of the Social Security Administration's refusal to furnish information to Law Enforcement Agencies. One example is:

A father took his 5-year old son away from the boy's grandfather who had legal custody. As a result, a Federal warrant was filed for the father's arrest and the FBI began looking for him. Three months later, the father contacted the Social Security office in the city where the child previously lived and requested that the child's Social Security check be forwarded to another office. The Social Security office told the grandfather about the request. The FBI immediately contacted the Social Security claim representative, explained that there was a Federal warrant for the father's arrest and asked where the father wanted the check sent. The claim representive told the FBI that Social Security headquarters had instructed him not to release any information without a subpoena. Two days later, the assistant U.S. attorney obtained a subpoena from the U.S. District Court Clerk and the FBI served the claim representative with the subpoena. Local Social Security officials contacted the Assistant Regional Attorney of the Department of Health, Education and Welfare, who advised them not to honor the subpoena based on Social Security regulations. The assistant U.S. attorney then advised the grandfather to go to the local Social Security office and request the needed information under the FOIA. Through an FOIA request, the grandfather received all the information needed to enable the FBI to locate the child and arrest the father.[30]

EXCHANGE OF INFORMATION

Exchange of Information among Federal, State and local law enforcement has been inhibited by the enactment of the P/A.[31] Certainly, a purpose of the P/A was to control the amount of unjustified information exchanged between the Law Enforcement Agencies. However, the P/A has created such limits and hardships on obtaining inter-agency information, that this channel has almost been eliminated. The guidelines in some instances are completely misinterpreted and taken out of context. It appears numerous officials, leary of a civil suit, have absolutely refused furnishing information to other Law Enforcement Agencies, citing the P/A.

Law Enforcement officials; FBI, DEA and ATF, complained about difficulties in obtaining taxpayer-related information from the Internal Revenue Service. The difficulties in obtaining information from the I.R.S. arises from provisions of the Tax Reform Act of 1976 which restricts the dissemination of taxpayer-related information for non-tax related crimes.[32]

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[28] Ibid, case examples.
[29] New York Times, "Misuse Of Files On Millions Feared", July 5, 1978, P. 1, p. D9.
[30] Report by the Comptroller General, U.S., "Impact of FOI/PA on Law Enforcement Agencies," 11/15/78, case examples p. 21-22, U.S. Gov't. Printing Office.
[31] Ibid, p. 10.
[32] Ibid, p. 10.

The I.R.S. participated in a Narcotics Trafficker Program with Customs, Justice Department and DEA in the early 1970's. This program was one of many strike force programs in operation and was designed to reduce the illegal profits in drug trafficking. Mr. Eugene Rossider, former Assistant Secretary of the Treasury, described the program "as one of the most successful law enforcement programs in our history. In a short period of time, 1800 major dealers were identified and investigations started on most of them, along with 3000 minor dealers". Mr. Rossider is firmly convinced that the cooperation between the agencies that made this program so successful has been eliminated due to the restrictions of the FOI/PA and its statellite provisions.[33]

James Power, Chief, U.S. Capital Police, described the importance of exchange of information between Law Enforcement Agencies.

Prior to the enactment of the Freedom of Information Act, as amended, and the Privacy Act, law enforcement officers and agencies felt free to exchange information concerning persons or groups posing threats of potential violence or of massive disorder. We were able to plan and could therefore prepare for security with less show of force, as we felt that we had fair knowledge of what was being comtemplated by the various groups, which we expected to be encountering on any given date.

All law enforcement professionals, and the distinguished members of this subcommittee, are thoroughly aware that in law enforcement we are wholly dependent for our effectiveness on rapid, timely and reliable information from a wide range of sources, including: other law enforcement agencies; a concerned and cooperative public; non-law enforcement agencies of government; banks; businesses; schools; and others.

Our ability—collectively and cooperatively within the law enforcement community at all levels—to rapidly gather, assemble, analyze, retrieve, and disseminate among professionals in law enforcement information about crime and criminals is absolutely crucial to our role in providing a reasonably safe and wholesome environment for our citizens.

I am attempting to describe an open and straightforward system of collecting and evaluating data about criminals, criminal events, criminal conspiracies, or other activities that are apparently crime conducive. The collection and evaluation of such specific kinds of facts and details yields criminal intelligence—I prefer to say "criminal information" to avoid confusion with the past—that has a reasonable chance of leading to the identification of offenders and their successful prosecution.[34]

Examples of some cases where the FBI encountered difficulties in obtaining information from Federal Agencies follow:

During an FBI investigation in a western city, under the Racketeer Influence and Corrupt Organization statute, information developed on a subject was provided to an I.R.S. agent. The I.R.S. agent advised that due to the P/A, the I.R.S. could accept information valuable to them but could not provide any information that would aid an FBI-related case.

During an unlawful flight to avoid prosecution/murder investigation, the FBI found that the subject was receiving a monthly disability check from the Social Security Administration. Although the Social Security Administration confirmed the subject was getting a check, it declined to furnish the address where the check was being sent because of the P/A. The subject was eventually located, but it took over 3 months of investigative effort.[35]

STATE AND FEDERAL AGENCIES

State officials fear that exchange of information with Federal agencies may lead to the identity of their own sources. As mentioned previously, requests under the FOI/PA have enabled the requestors to glean from the information furnished by the Federal agency the identity of the informant, as well as the specifics of the investigation. This also hampers the State's ability to recruit and obtain information through informants.

Reverse situations have also occurred wherein information was requested by the State was not furnished by the Federal agency. To illustrate, an informant of the I.R.S. advised an I.R.S. agent that he was a witness to a murder and would be willing to testify at the trial conducted in Florida. The informant advised the I.R.S.

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[33] Report of the Subcommittee on Criminal Laws and Procedures, etc., Eugene Rossider, former Assistant Secretary of the Treasury, p. 90.

[34] Ibid, testimony of James Powell, Chief U.S. Police, May 9, 1978, p. 39.

[35] Report by the Comptroller General, U.S., "Impact of FOI/PA on Law Enforcement Agencies," 11/15/78, case examples, p. 11, U.S. Government Printing Office.

agent that he witnessed the defendant murder the victim. Under FOI/PA and informant guidelines, the agent could not disclose this information to the Florida prosecutor until a full written report was sent to Washington and approved. One month later Washington notified the Florida prosecutor. However, the trial ended three weeks prior to the Washington notice and the defendant was acquitted.

Several examples of situations in which local officials have been reluctant to provide information.

FBI agents working on organized crime cases in a southwestern city reported that they were excluded from intelligence meetings held by State and local law enforcement agencies. Several State law enforcement officers cited concern over FOI/PA disclosures as the reason for excluding the agents from the meetings.

A southern city's police intelligence unit learned that one of its intelligence reports, furnished to the FBI with assurances of confidentiality, had been released under the FOIA. Although this document did not reveal the identity of any informants, the unit refused to furnish any further written information to the FBI. It simply did not believe, the FBI could guarantee confidentiality for information provided, and it wanted to avoid the possible compromise of informants.

An extremist organization's leader, who was convicted of two murders, received documents from FBI headquarters through an FOIA request. The convicted leader's attorney informed a mideastern city's police intelligence officer that, after reviewing the documents, the leader had identified the police department's informant in the murder case. This police department will no longer furnish written reports to the FBI.[36]

REACTION OF THE FEDERAL AGENTS

The ACLU, National Lawyers Guild and the Law Center for Constitutional Rights has launched a program, since the early 1970's, of legal harassment against law enforcement agencies. Its main objective is to destroy intelligence activities by limiting political surveillance within the United States. They have launched numerous civil suits for a multitude of reasons against the agencies, as well as the agents themselves. Extensive utilization of the FOI/PA has enabled these organizations to effectively harass the agencies and agents with these civil suits.

This has created a climate of fear among the agents which extends itself to extreme conservatism. Law enforcement activities are not synonomous with an extreme conservative outlook, since law enforcement is predicated on the basis of agressiveness.

Mr. John Olszewski, former Director of Intelligence for the I.R.S., told the Subcommittee that law enforcement officers are not people of means. As a result, many are taking one of three courses of action: (1) they are attempting to buy personal liability insurance, or (2) they are avoiding involvement in duties which may make them vulnerable, or (3) if assigned these duties, some will simply avoid inputting data into the record.[37]

CONCLUSIONS

No Law Enforcement Agency and no national government can function without the instrument of intelligence. The government may have dangerously weakened its ability to protect the individual, community and nation. Many Law Enforcement Agencies at State and local levels have completely abandoned the intelligence function and terminated their domestic intelligence units.[38] All in response to provisions of the FOI/PA.

Furthermore, this report did not cover the difficulties insurance companies, banks, hospitals and other industries suffer because of the inability to perform meaningful background checks under the Privacy Act and Fair Credit Reporting Act. Nor did this report entertain the host of problems the Federal Security Program is encountering under the FOI/PA.

An equitable balance has to be struck between FOI/PA openness and the confidentiality needed to perform successful criminal investigations and intelligence operations. Congressional action is needed to clarify the FOI/PA Acts and establish in definite terms (1) practical guidelines for institutions to furnish information, and (2) provisions to maintain confidentiality under the FOI/PA.

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[36] Ibid, p. 12.

[37] Report of the Subcommittee on Criminal Laws and Procedures, etc., testomony of John Olszewski, Director of Intelligence, July 13, 1977, p. 32.

[38] Ibid, p. 2.

Much press has been devoted to the invasion of privacy simply because it "makes good print and sells copies". Undoubtedly the majority of citizens who scream "invasion of privacy", are criminal violators seeking an escape from their own poor position. The citizens who have never violated a law are being neglected because a small minority has managed to utilize the FOI/PA to their advantage. It is time to turn the heads of the media to public security, the protection of its citizens and establish once again a confidence in its Law Enforcement Agencies.

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Senator HATCH. Our last witness is Vince McGoldrick, legislative chairman of the Fraternal Order of Police.

President John Dineen of the Fraternal Order of Police was unable to be with us today. He asked Mr. McGoldrick to present his testimony.

Mr. McGoldrick has extensive experience in police work and has been affiliated for many years with the Fraternal Order of Police.

He is accompanied by Tony Morris who has nearly 20 years of experience in law enforcement in the District of Columbia.

We are really happy to see you both, and we would be happy to take your testimony at this time.

STATEMENT OF VINCE McGOLDRICK, CHAIRMAN, NATIONAL LEGISLATIVE COMMITTEE, FRATERNAL ORDER OF POLICE, WASHINGTON, D.C., ACCOMPANIED BY ANTHONY J. MORRIS, LIEUTENANT, INVESTIGATIVE SERVICES DIVISION, METROPOLITAN POLICE DEPARTMENT, WASHINGTON, D.C.

Mr. McGOLDRICK. I would like to thank you for allowing us the opportunity to come and offer testimony before your subcommittee.

I address you today on behalf of over 160,000 members of the Fraternal Order of Police from throughout the United States. We come before you to speak on behalf of certain amendments to the Freedom of Information Act which will increase the ability of the law enforcement agencies to protect the public security.

The Fraternal Order of Police does not take objection to the Freedom of Information Act, but we feel that the amendments provided in S. 587 would take into consideration the legitimate rights of law enforcement without violating the equally legitimate rights of privacy of our citizens.

The first amendment the Fraternal Order of Police is in favor of would be in section 4 of the Freedom of Information Act, a blanket exemption of the release of rosters of law enforcement personnel and personnel of national intelligence agencies.

This amendment, we feel, is necessary to protect those who enter into the difficult field of law enforcement from any harassment in their private lives.

The next amendment in section 4 would be a blanket exemption covering all confidential law enforcement training manuals, investigative handbooks, and manuals dealing with confidential investigative technology.

The need for such an amendment was best described in prior hearings before the Subcommittee on Internal Security which disclosed many people would obtain these manuals and handbooks for illegal uses.

The final amendment to section 4 would exempt from disclosure all information received on a confidential basis from foreign governments or from State or local government agencies.

This amendment would relieve the reluctance of many State and local government agencies to share law enforcement intelligence with agencies of the U.S. Government because of the fear this information could be disclosed pursuant to the Freedom of Information Act.

In section 7 of the Freedom of Information Act, the Fraternal Order of Police recognizes the need to protect intelligence information and informants providing such intelligence from immediate disclosure through the Freedom of Information Act.

The proposed amendments would call for a ban on the release of records contained, collected, or used for law enforcement purposes for a period of 10 years after termination of an investigation.

This provision would make it difficult for the criminal element in our society to utilize the legitimate sources of the Freedom of Information Act for their own illegal purposes.

There are many other legitimate and necessary amendments which are proposed in this legislation. Many of these amendments have been made, taking into consideration a set of amendments proposed by Director Webster of the Federal Bureau of Investigation.

The Fraternal Order of Police has addressed itself mainly to those amendments which apply directly to individual officers or to their personal liability as to intelligence information gathered.

We would hope that the subcommittee would see the need for the proposed amendments which we feel would not in any way deprive citizens of their rights but would, we feel, improve the ability of the law enforcement community to provide for the safety of the law-abiding citizenry.

Your positive cooperation of the amendments contained in S. 587 would be sincerely appreciated by not just the members of the Fraternal Order of Police but all of those working in the field of law enforcement.

At this time I want to thank you for your time and consideration.

Mr. Morris would be happy to field any questions that you may have to ask of us.

Senator HATCH. Thank you so much.

How would the release of investigative and training manuals and personnel rosters of Federal law enforcement agencies and the possibility of disclosure of informants' identities affect law enforcement at the State and local levels?

Mr. MORRIS. That question has been answered very succinctly by several previous witnesses, but I will echo some of their comments.

Any release of information compromising the identity of undercover people, for obvious reasons, could not be condoned.

Senator HATCH. You feel it would be a stultification to your efforts.

Mr. MORRIS. Yes, sir, it would.

Senator HATCH. To your law enforcement efforts that is.

Has there been a reduction in the cooperation of informants with local law enforcement agencies as a result of the Federal disclosure laws, such as the Freedom of Information Act?

Mr. MORRIS. Yes; there has been.

One of the previous witnesses, Mr. Burke from the Secret Service, addressed that. I have to concur with him.

I spent a few years in the intelligence unit in the Metropolitan Police Department. In that capacity, I did exchange information. I had contact with law enforcement officers throughout the United States, both the Federal and local.

There is a reluctance on the part of local law enforcement to pass on information to Federal agencies because of the possibility of that information being compromised in an FOIA request.

One of the problems, to be specific, is this.

The information that is gathered by the originating agency—the person preparing the report—there are certain nuances and there

are certain things that may or may not be in the report that are known only to the investigator or the agency preparing it.

The information is raw intelligence transmitted to another agency. That agency goes over that piece of information. They may not realize the ramifications or the implications of releasing all or certain parts of that report, which may compromise an investigation or a source of information.

There are a lot of subtle things that go into this also. Internally in the organization, a specific investigator—and I know of instances with being specific about them—is reluctant to enter information into the files of his own agency for fear that this information will be compromised through FOIA.

I can tell you that sometimes the character of that information is such that the identity of the source can be compromised.

To give you an example, if three subjects are involved in a criminal act, one of the three subjects files an FOIA request. There may be a comprehensive report covering the activities of that individual and all his associates over a considerable period of time.

Providing him with that information, even though the identity of the source may be excised from the report and certain other identifying criteria, especially if one of the people supplying the information is one of the three individuals, it is not very difficult for the requester to determine where the information came from.

The requester knows where he was on such and such a date. He knows who he was with and where he traveled. By providing him this information, he is able to determine who the source is.

In many instances, that would be very dangerous to the life of the individual providing the information. Some of these people just do not have any scruples when it comes to taking some type of aggressive action against somebody who provided information to law enforcement.

Senator HATCH. Back in 1978, as I recall—and I could be wrong on this, but I think it is correct—the Fraternal Order of Police representatives indicated that before the Freedom of Information Act, as contrasted with today or then—the percentage of informant testimony that they had in 1978, compared to the 100 percent they had before the Freedom of Information Act, came down to about 25 percent. Do you think it is more or less than that?

Mr. MORRIS. I would say that is a fair estimation.

To be honest with you, Senator, it would have to be a ball park figure coming from me. I do not know; I do not have a handle on those specific figures.

I know it is definitely a problem.

I know in actual practice and actually working in investigations, sources are reluctant to come forward.

Senator HATCH. Sources that used to come forward are now reluctant.

Mr. MORRIS. This is true. They feel that you cannot protect their identities. They are afraid to come forward.

Another thing: In the past, many agencies throughout the country, kept voluminous records on any number of things under the guise of intelligence. With the Freedom of Information Act, many records were purged. Quite frankly, that is what happened. A lot of them were purged.

A lot of agencies today just do not keep the quality of information and the type of information they had before.

As a result, agencies like the Secret Service that have the responsibility for the protection of the President and the FBI which works on terrorist organizations are not able to gather information. It just is not there anymore.

Sometimes internal directives prohibit a gathering of specific information. We have internal guidelines that say, in essence, that you can gather information only of a criminal nature.

There is a lot of information that comes down the pike that does not make sense until a year later or 6 weeks later or whatever. It may not be specifically criminal, but it is necessary or would prove to be beneficial later on in the investigation.

A lot of information is just not put in a file. It is not gathered or generated or passed on.

The end result is that the whole law enforcement response to any specific problem is reduced considerably.

We have worked with the Secret Service in this city hand in hand—with the Protective Intelligence Division specifically. We find them to be a fine bunch of detectives and officers, and we have an excellent relationship with them.

However, we have unwritten codes, and we know.

Within the federal system in the Department of Justice, for instance, they can exchange information between Federal agencies; but they are precluded from passing on this information to the locals.

If you get involved with some type of investigation where two agents or detectives from different agencies are working—one local and one Federal—he may come into possession of information which he cannot pass on to you without subjecting himself to a possible $5,000 penalty for releasing the information.

On the other hand, I might have information that I want to pass on to the Federal level, but I cannot trust getting it into their file system; because the agent that I gave it to is not the one who determines whether that information is or is not released. They have groups within agencies that do nothing but handle FOIA requests.

If I give information to agent A and it is inserted into his files, some agent from another group who is not aware of the ramifications or the implications of it has to review it and determine whether or not it should be released.

Even if he does not release it, some agencies have taken the position that if they have received an FOIA request for a specific piece of information and they have it and it comes from another agency, they will not give up the information per se. They will tell the requester: We cannot give it up, but we have information in our files from the Metropolitan Police Department.

Therefore, the information the requester may want is over in our department.

Senator HATCH. Thank you so much.

We appreciate your effort, and we appreciate your coming in today.

With that, we will recess these hearings until further notice.

[Whereupon, at 11:35 a.m., the subcommittee recessed, to reconvene subject to call of the Chair.]

FREEDOM OF INFORMATION ACT

THURSDAY, SEPTEMBER 24, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch, Thurmond, and Leahy.

Staff present: Randall Rader, counsel; Steve Markman, general counsel; Peter Ormsby, professional staff member; Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. This is the fourth day of hearings concerning the Freedom of Information Act. Today the subcommittee will primarily explore the impact of the Freedom of Information Act upon our Nation's vital intelligence-gathering agencies.

In just a few moments this morning I would like to put this hearing into a broader context. The military strength of the United States has seriously dwindled relative to our adversaries in recent years. As our might and with it our credibility have deteriorated, we must put an even greater burden on our eyes, ears, and wiles to maintain our national security and defend our principles of freedom in the international arena. Because a fox lacks the brute strength of a bear, it must rely on wits and senses to stay ahead of threats.

While not contending that our military might is only a fox in comparison to the bearlike forces of our adversaries and terrorists, I do want to stress that reductions in real defense spending over the past decades have placed us in the unenviable position of relying on our intelligence capabilities more than we may wish. Without adequate intelligence services we could become like a blind man trying to negotiate a minefield.

The real irony, however, would be if we were blinding ourselves. In November 1975, Richard Welch, the CIA Chief in Greece, was identified by news accounts as an agent. A few weeks later he was savagely gunned down on his own doorstep. Other U.S. officers have narrowly escaped injury when their names have been disclosed.

The problem with unauthorized disclosure of information identifying U.S. intelligence officers is the subject of a bill now before the full Judiciary Committee, S. 391. The House version of this bill passed yesterday.

I find it ironic that our Federal Criminal Code now punishes disclosures of Department of Agriculture crop estimates. In other words, our law protects statistics about possible corn production far better than the lives of vital intelligence personnel like Richard Welch. In the sense that we are not protecting our intelligence personnel, we may be closing our eyes when we most need them.

I think we need to consider the Freedom of Information Act in this context. We must learn if FOIA is endangering the mission of the Central Intelligence Agency, the National Security Agency, and other Government bodies charged with a function so vital to our national defense. We must uncover if foreign sources of information, even allies, hesitate to share information with U.S. intelligence officers due to the widespread belief that we cannot protect secrets.

We must discover if informants, one of the most vital sources of foreign intelligence, are reluctant to cooperate with the United States because they doubt that we can insure their confidentiality. We must determine if court review of denied FOIA requests, such as the recent District of Columbia circuit case that ordered some classified CIA documents released, is presenting the prospect that sensitive files may be open to hostile eyes.

We pride ourselves on our Nation's openness, on our freedom of information policies dating back to the first amendment in 1789. We do not want to indiscriminately reduce that openness but we must at the same time be sure that our openness does not become a weapon for those who would undermine our freedoms.

As I have mentioned, our Nation may be depending more on its intelligence sources today than at any time since Gen. George Washington depended upon Benjamin Franklin's communications from France to alert him to British tactics and naval resupplying missions. Accordingly, I am pleased that we have gathered some of the Nation's top experts to help us learn the effect of the Freedom of Information Act upon our intelligence agencies.

Senator HATCH. I notice that Senator D'Amato is here. Bill, would you mind if we have Senator D'Amato go first since his bill is one of the proposals under consideration today?

Mr. CASEY. Not at all.

Senator D'AMATO. Mr. Chairman, if it please the committee it might even prove more interesting to hear the Director of our CIA give his testimony in support of the bill. Whatever the Chair wishes, I am certainly willing to——

Senator HATCH. Why don't we have you first summarize your statement, Senator D'Amato, and then have Director Casey testify after you? I will introduce you both now and then we will go in that order.

Our first witness will be the distinguished junior Senator from the State of New York, Alfonse D'Amato. Senator D'Amato is the author of one of the primary bills, S. 1235, to protect the intelligence function from undue disclosures under the Freedom of Information Act. We are pleased to have one of our colleagues, who has

devoted a considerable amount of time to studying this problem, share his thoughts with us.

We are also very happy to welcome to the subcommittee the next witness to address this topic, William Casey, Director of the Central Intelligence Agency. We could have no better witness on this particular subject that the Director of the Agency itself. As the individual most responsible in the United States for our first line of defense, we are pleased today to welcome you, Mr. Director, to give us your assessment of the impact of the Freedom of Information Act on our Nation's vital intelligence-gathering functions.

We appreciate your taking the time to be with us this morning, and look forward to your testimony. At the close of your remarks, the full text of which will be made part of the record, the subcommittee would of course like to ask you some questions.

We will turn to Senator D'Amato first and then Director Casey.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, I thank you for giving me the opportunity of testifying before you and the committee today in support of Senate bill 1235, the Intelligence Information Protection Act, which I introduced on May 20. Since that time 22 of my colleagues from both sides of the aisle have joined me by cosponsoring this important legislation. I might add that an identical bill, H.R. 4518, has been introduced in the House.

In order to understand why the Freedom of Information Act must be amended, one need only look at some of the abuses under this act. Those openly hostile to the national interest, such as Philip Agee, the Covert Action Information Bulletin, Counterspy Magazine, and others have disclosed classified materials including development of antiterrorist methods and nuclear capability of our allies.

Incidents such as these are merely the tip of the iceberg. The day-to-day effects are even more detrimental. Allies have in many cases been reluctant or refused to share information with us because they fear disclosure of their agents' identities. One official of a European intelligence agency stated;

> I dare say none of my colleagues today would pass on to the Americans sensitive data about our work on the Continent or even hint at anything we have which would identify agents in the field. It would be suicide for our people.

Foreign nationals who would otherwise have aided the United States have declined to do so because of the possible FOIA requests. Examples were given in testimony last year by former Deputy Director of the CIA, Frank Carlucci: A foreign national who decided not to continue work with the United States after having worked with us for 2 years; another individual who had worked with us for 3 years discontinued his relationship because of fear of disclosures, because of fear that he would be exposed. In addition, we are failing to attract new agents, again because of fear that their identity will be revealed.

In addition, an inordinate amount of time—and I am sure that Director Casey will address himself to this—is being spent, great demands are being placed on the senior intelligence officers who

are required to process the freedom of information requests. This unfortunately comes about as a result of the sensitivity and the nature of the requests and the information which is available only on a need-to-know basis, consequently requiring those senior CIA officials to process these daily requests for freedom of information.

I think it is important to clarify at the outset what this bill does not do. It in no way affects the ability of individuals to obtain their own files under the Privacy Act. It does not infringe upon oversight by either the House or Senate Committees on Intelligence. It does not affect declassification under Executive Order 12065.

The intent of this bill is the following: First, it tightens loopholes existing in present exemptions. The bill adds internal rules, practices, personnel training, and reorientation as exemptions. It also amends exemption number six regarding personnel files, exempting all personnel records of the CIA except for use by an individual for employment outside of the CIA. It also clarifies distinctions between law enforcement records and national intelligence investigatory records, clearly defining that investigatory activities of the CIA will be exempt.

Second, it adds new exemptions protecting materials related to special activities, clandestine collection, or covert operations, and protecting the internal operation, office management, and organization of the CIA.

Third, S. 1235 amends the provisions regarding severability, so that if any part of a document is exempt the entire document is exempt. I might add that that was basically what the Freedom of Information Act did in 1966, Mr. Chairman, when it was first adopted. Then, as amended in 1974 it did away with the severability clause, so that now we have a situation where sensitive documents are literally made public. We have a CIA officer, a senior officer, who has to try to delete as much as he possibly can but that document itself cannot be protected.

That is not what was intended in 1966. The 1974 amendment to the Freedom of Information Act jeopardized the security activity of this Nation, impaired the effectiveness of the CIA, and makes it impossible for us to have the kind of effective intelligence community and operation that we need for our national security.

I would ask that the committee take the balance of my remarks as if read in their entirety, and let me just conclude with——

Senator HATCH. Without objection, it is so ordered.

Senator D'AMATO. Thank you, Mr. Chairman.

One remark, I think, that goes back to our Nation's Founding Fathers, is a quotation from George Washington when he was speaking to Col. Elias Dayton about the necessity for good intelligence. He said:

> The necessity of procuring good intelligence is apparent and need not be argued any further. All that remains for me to add is that you keep the whole matter as secret as possible, for upon secrecy success depends in most enterprises of this kind, and for want of it, they are generally defeated however well planned.

I hope that this subcommittee will carefully review this bill and report it favorably to the full Judiciary Committee. Our intelligence community, indeed our Nation, deserves no less.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator D'Amato.

[The prepared statement of Senator D'Amato and additional questions submitted to Senator D'Amato with responses follow:]

TESTIMONY
OF
SENATOR ALFONSE D'AMATO

S.1235

MR. CHAIRMAN, MEMBERS OF THE JUDICIARY COMMITEE ---

I THANK YOU FOR GIVING ME THE OPPORTUNITY TO TESTIFY REGARDING S. 1235, THE INTELLIGENCE INFORMATION PROTECTION ACT, WHICH I INTRODUCED ON MAY 20. SINCE THAT TIME, 22 OF MY COLLEAGUES FROM BOTH SIDES OF THE AISLE HAVE JOINED ME BY COSPONSORING THIS IMPORTANT LEGISLATION, AND AN IDENTICAL BILL, H.R. 4518 HAS BEEN INTRODUCED IN THE HOUSE.

IN ORDER TO UNDERSTAND WHY THE FREEDOM OF INFORMATION ACT MUST BE AMENDED, ONE NEED ONLY LOOK AT SOME OF THE ABUSES UNDER THIS ACT. THOSE OPENLY HOSTILE TO THE NATIONAL INTEREST SUCH AS PHILIP AGEE, THE COVERT ACTION INFORMATION BULLETIN, COUNTERSPY MAGAZINE, AND OTHERS HAVE DISCLOSED CLASSIFIED MATERIALS INCLUDING DEVELOPMENT OF ANTI-TERRORIST METHODS, AND THE NUCLEAR CAPABILITY OF OUR ALLIES.

INCIDENTS SUCH AS THESE ARE MERELY THE TIP OF THE ICEBERG; THE DAY-TO-DAY EFFECTS ARE MORE DETRIMENTAL. ALLIES HAVE IN MANY CASES BEEN RELUCTANT, OR HAVE REFUSED TO SHARE INFORMATION WITH US BECAUSE THEY FEAR DISCLOSURE OF THEIR AGENTS' IDENTITIES.
ONE OFFICIAL OF A EUROPEAN INTELLIGENCE AGENCY STATED, "I DARESAY NONE OF MY COLLEAGUES TODAY WOULD PASS ONTO THE AMERICANS SENSITIVE DATA

ABOUT OUR WORK ON THE CONTINENT, OR EVEN HINT AT ANYTHING WE HAVE WHICH WOULD IDENTIFY AGENTS IN THE FIELD. IT WOULD BE SUICIDE FOR OUR PEOPLE."

FOREIGN NATIONALS WHO WOULD OTHERWISE HAVE AIDED THE U.S. HAVE DECLINED TO DO SO, BECAUSE OF POSSIBLE F.O.I.A. REQUESTS. EXAMPLES WERE GIVEN IN TESTIMONY LAST YEAR BY FORMER DEPUTY DIRECTOR OF THE CIA, FRANK CARLUCCI: A FOREIGN OFFICIAL WHO DECIDED NOT TO CONTINUE COOPERATION AFTER AIDING THE U.S. FOR TWO YEARS; ANOTHER INDIVIDUAL WHO HAD PROVIDED THE U.S. WITH INFORMATION FOR THREE YEARS DISCONTINUED HIS RELATIONSHIP BECAUSE OF FEAR OF DISCLOSURES. WE ARE NOT ONLY LOSING OPERATIVES, BUT WE ARE FAILING TO ATTRACT NEW AGENTS.

AN INORDINATE AMOUNT OF TIME HAS BEEN WASTED AND GREAT DEMANDS HAVE BEEN PLACED ON SENIOR INTELLIGENCE OFFICERS WHO ARE REQUIRED TO PROCESS F.O.I.A. REQUESTS. THIS UNFORTUNATELY IS THE ONLY WAY THE CIA CAN PROCESS THESE REQUESTS DUE TO THE INFORMATION AVAILABLE ON A NEED TO KNOW BASIS ONLY.RELEASING THIS INFORMATION REQUIRES SENIOR OFFICIALS WHO POSSESS SUFFICIENT KNOWLEDGE TO MAKE SECURITY DECISIONS TO AUTHORIZE RELEASE OF CIA DOCUMENTS.

I THINK IT IS IMPORTANT TO CLARIFY AT THE OUTSET WHAT THIS BILL DOES NOT DO. IT IN NO WAY AFFECTS THE ABILITY OF INDIVIDUALS TO OBTAIN THEIR OWN FILES UNDER THE PRIVACY ACT. IT DOES NOT INFRINGE UPON OVERSIGHT BY THE HOUSE OR SENATE COMMITTEES ON

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INTELLIGENCE. IT DOES NOT AFFECT DECLASSIFICATION UNDER EXECUTIVE ORDER 12065.

THE INTENT OF THIS BILL IS THE FOLLOWING:

FIRST, IT TIGHTENS LOOPHOLES EXISTING IN PRESENT EXEMPTIONS. THE BILL ADDS INTERNAL RULES, PRACTICES, PERSONNEL TRAINING, AND REORIENTATION AS EXEMPTIONS. IT ALSO AMENDS EXEMPTION #6 REGARDING PERSONNEL FILES, EXEMPTING ALL PERSONNEL RECORDS OF THE CIA, EXCEPT FOR USE BY AN INDIVIDUAL FOR EMPLOYMENT OUTSIDE THE CIA. IT ALSO CLARIFIES DISTINCTIONS BETWEEN LAW ENFORCEMENT RECORDS AND NATIONAL INTELLIGENCE INVESTIGATORY RECORDS--CLEARLY DEFINING THAT INVESTIGATORY ACTIVITIES OF THE CIA WILL BE EXEMPT.

SECOND, IT ADDS NEW EXEMPTIONS: PROTECTING MATERIALS RELATED TO SPECIAL ACTIVITIES, CLANDESTINE COLLECTION, OR COVERT OPERATIONS AND PROTECTING THE INTERNAL OPERATION, OFFICE MANAGEMENT, AND ORGANIZATION OF THE CIA.

THIRD, S.1235 AMENDS THE PROVISION REGARDING SEVERABILITY, SO THAT IF ANY PART OF ANY DOCUMENT IS EXEMPT, THE ENTIRE DOCUMENT IS EXEMPT.

FINALLY, MY BILL PROHIBITS FEDERAL COURTS FROM ORDERING THE CIA TO RELEASE DOCUMENTS WHICH HAVE BEEN EXEMPTED. THIS IS IN NO WAY SIMILAR TO PROPOSALS WHICH WOULD ELIMINATE FEDERAL COURT JURISDICTION OVER CERTAIN CONSTITUTIONAL ISSUES, SINCE THE SUPREME COURT, IN BRISCOE v. BELL (432 U.S. 404 1977), HAS ALREADY STATED THAT CONGRESS HAS THE POWER TO MAKE ADMINISTRATIVE AGENCY

DECISIONS NON-REVIEWABLE BY COURTS. I AM ALSO AWARE THERE ARE THOSE WHO CLAIM THAT THE CIA HAS, IN AN ATTEMPT TO BLOCK RELEASE OF INFORMATION HAS ALWAYS BEEN SUCCESSFUL. THE CIA HAS ALREADY LOST A CASE IN WHICH A JUDGE ORDERED THE RELEASE OF CLASSIFIED DOCUMENTS (HOLY SPIRIT ASSOCIATION v. CIA 636 F 2D 838 1980), AND IN ANOTHER CASE, AFFADAVITS USED BY THE CIA TO SUPPORT ITS CLAIMS FOR EXEMPTION WERE REQUIRED TO BECOME PUBLIC (LETELIER BOMBING CASE).

THE NEED FOR SECRECY IN INTELLIGENCE MATTERS HAS BEEN QUESTIONED BY SOME INDIVIDUALS IN RECENT YEARS. WE SHOULD PERHAPS LOOK BACK TO GEORGE WASHINGTON'S WORDS TO COLONEL ELIAS DAYTON, "THE NECESSITY OF PROCURING GOOD INTELLIGENCE IS APPARENT AND NEED NOT BE FURTHER ARGUED. ALL THAT REMAINS FOR ME TO ADD IS THAT YOU KEEP THE WHOLE MATTER AS SECRET AS POSSIBLE. FOR UPON SECRECY, SUCCESS DEPENDS IN MOST ENTERPRISES OF THIS KIND, AND FOR WANT OF IT, THEY ARE GENERALLY DEFEATED HOWEVER WELL-PLANNED."

I HOPE THIS SUBCOMMITTEE WILL CAREFULLY REVIEW THIS BILL AND REPORT IT FAVORABLY TO THE FULL JUDICIARY COMMITTEE. OUR INTELLIGENCE COMMUNITY DESERVES NO LESS.

ADDITIONAL QUESTIONS SUBMITTED TO SENATOR D'AMATO WITH RESPONSES

QUESTION:

1) S. 1235 (your bill) creates a new 10th exemption within the Freedom of Information Act for "special activities, clandestine collection, or covert operations of the CIA." Can these three terms be defined with sufficient clarity to avoid a lawsuit every time a requester thinks this request falls outside these categories?

ANSWER:

Yes. The definitions of these terms in the bill are taken from Executive Order 12063. They encompass the three different aspects of operations. An operation either involves intelligence gathering ('clandestine collection"), covert action, consisting of any activities to further foreign policy objectives abroad ("special activities"), or involves some aspects of both ("covert operations"). In addition to the safeguard of this overlapping category, there is the additional provision that no federal court can order the CIA to release documents for which it has claimed an exemption. Because of both of these provisions, lawsuits would be avoided.

PAGE TWO:

QUESTION

2) As you know, the House passed a bill to criminalize the activity of divulging the identities of our agents. A similar bill is awaiting action in the Senate Judiciary Committee. Will passage of this bill, in your opinion, provide sufficient protection for our intelligence officers or do you feel we should also amend the Freedom of Information Act?

ANSWER:

Passage of the amended version of H.R.4 (with the Ashbrook amendment which replaced "interest" with "reason to believe") is an extremely important step to rectify one aspect of a problem that has severely harmed the members of the intelligence community. I am one of over 40 cosponsors of S.391, the Senate companion to the amended version of H.R.4, and strongly believe it is essential for this bill to pass. However, the published disclosure of agent identities is only one part of the problem. The Freedom of Information Act, if it remains unamended, will still permit information regarding identities and operations to be released. Individuals receiving this information will be free to act upon it or reveal it to whomever they wish, as long as they do not publish it. Even if identities cannot be published, there is still the problem of information being received by those hostile to the United States, which can be used against our operations and to the detriment of our agents' safety.

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QUESTION

3) Several commentators on this debate about F.O.I.A. and national security have noted that current regulations regarding classified material have been ample protection up to now for intelligence sources and methods. Can you see reasons for putting protections against disclosure of intelligence methods into the law instead of just relying on regulations?

ANSWER:

It is not accurate that regulations provide sufficient protection against the disclosure of intelligence methods. For example, specifics regarding antiterrorist devices and methods were obtained under F.O.I.A. and printed June 16, 1980 in a national newspaper. Information retrieval methods, training materials and instructions to overseas offices have also been published after being obtained through F.O.I.A. releases. Additionally, if the decision in the Holy Spirit Association v. CIA case is upheld, a precedent will be set for courts to overrule such regulations. Therefore, exemptions must be in law; regulations are not sufficient.

QUESTION:

4) Senator, I know that you serve on the Appropriations Subcommittee and specifically on the subcommittees controlling Foreign Operations and Defense spending. Are there adequate congressional checks through committee oversight and funding, to prevent the CIA from "stepping out of line" if F.O.I.A. were amended to reduce the number of requests CIA would have to answer?

ANSWER:

Yes. The House and Senate Intelligence Committees, and to a lesser extent, the Defense Subcommittee of the Appropriations Committee, are more than adequate safeguards. First, these Congressional Committees have greater oversight and investigative power than at any time in our history. Second, the resources of these committees insure extensive and thorough oversight. Third, these Committees have safeguards against breaches of security.

In contrast, self-appointed "regulators" who seek information under F.O.I.A. cannot conduct any effective type of "oversight" Piecemeal revelations under F.O.I.A. do not have the same effect as thoroughly conducted Congressional investigations. Moreover, there are no safeguards against security breaches and leaks by individual F.O.I.A. requesters. Such individuals operate under no restraints, and in many cases, are hostile to our national interest.

Senator HATCH. Director Casey.

STATEMENT OF WILLIAM J. CASEY, DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY ERNEST MAYERFELD, DEPUTY GENERAL COUNSEL

Mr. CASEY. Mr. Chairman, it is a pleasure to have this chance to tell you about the Freedom of Information Act and its impact on American intelligence.

There is an inherent contradiction in applying a statute designed to assure openness in Government to work which is necessarily secret. In operation this has seriously impaired the functioning of an entire intelligence apparatus with no significant public benefit.

Now several bills have been introduced to alleviate this situation. The exemptions provided by your bill, Mr. Chairman, by Senator D'Amato's bill, by Senator Chafee's bill, would all be most helpful in reducing the burden of this requirement but would not remove the perception of our being unable to keep secrets and being subject to an openness standard that does not prevail elsewhere in the world, which has been so damaging to us.

Although these bills, Mr. Chairman, would all be most helpful, I will urge today that CIA, NSA [National Security Agency] and the Defense Intelligence Agency be entirely exempted from the Freedom of Information Act. As we face multiple threats around the world, as you indicated in your opening statement, we cannot, if we are serious about national security, continue to impose this burden on our most sensitive intelligence agencies.

To search and review records in response to these requests poses special problems for the intelligence agencies. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under FOIA.

The search for information responsive to one of these requests is an especially time-consuming task for us but what is of ultimate concern or major concern is the level of employee, the level of talent and experience which must become involved in this review process. When we locate records in response to one of these requests, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld in accordance with applicable exemptions.

In other Government agencies the review of information for possible release is a routine administrative function. In order to protect matters such as the security of operations or the identities of intelligence sources in the intelligence agencies, it can be a matter of life or death for human sources.

In some circumstances, mere acknowledgement of the fact that we have any information on a particular subject or have engaged in a particular type of activity would be enough to place a source of that information in danger, enough to compromise ongoing operations, or to impair relations with foreign governments. This kind of review is not a task which can be entrusted to individuals hired specifically for this purpose.

We need careful, professional judgment in review of information surfaced in response to these requests. This review requires the

time and attention of intelligence officers whose primary responsibilities involve participation in, and management of, crucial programs of intelligence collection and analysis for the President and our foreign policymaking establishment.

I think the situation was summed up, Mr. Chairman, by Judge Gerhard Gesell, of the U.S. District Court for the District of Columbia, when he said in a recent decision:

> It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security, which this process necessarily entails and requires.

This is merely an up-to-date version of the perception which George Washington had, and which Senator D'Amato just brought to our attention.

The United States is the only nation in the world whose intelligence agencies are subject to this kind of a requirement. Handling these requests consumes about 5 percent of our operational officers, men who have been carefully selected and trained, experienced, to acquire the intelligence we need. Five percent of them have to devote themselves to this function, which jeopardizes our capability with no significant public benefit.

Altogether some 200 people work on these requests, amounting to 144 man-years. A simple request might require 21 record systems to be searched, a difficult one, over 100, at a cost of about $3 million a year. A single request recently by Philip Agee—who publishes the Covert Action Bulletin and goes around the world exposing undercover agents for the express and explicit purpose of impairing American intelligence capabilities—cost $325,000; a pile of documents, two piles this high—I do not know how many other documents had to be searched to get it—cost $325,000 in personnel and over $70,000 in computer time for a total of about $400,000.

There is also here an enormous opportunity for error and inadvertent release of information. This has already created severe diplomatic embarrassment and jeopardized lives. I would be glad to detail some of this in closed session at any time.

However, what is most damaging of all is the perception created by the application of this law to intelligence. We get a large proportion of the essential intelligence we acquire from friendly intelligence services, none of them subject to a requirement like this. Some 15 have told us that they feel obligated to restrict the flow of information to us because of this requirement. Nobody knows how many or to what degree other services restrict information without telling us about it.

Our agent network is placed in jeopardy. Good agents decide that they cannot entrust their careers, their lives, their reputation, to working with us because they do not have any confidence in our ability to keep secrets. We again have many examples of this which could be put forward in closed session.

However, perhaps most important of all is the fact that the intelligence relationship, the agent relationship, the matter of getting the critical human intelligence, depends on a case officer being able to recruit somebody who will work with us, develop a contractual relationship with him. To do this requires establishing trust

and confidence, and providing the assurance that the relationship will be kept confidential.

The very existence of the Freedom of Information Act and its application to intelligence agencies makes this a very difficult task, creates a mental hazard which impairs the work of a case officer, and as I said before, causes many people who want to work with us to turn the other way or turn their backs to us. Therefore, the perception which this requirement creates is what has to be eliminated.

Liaison services and agents know that the KGB and other adversaries can demand information under this act. No other intelligence service in the world is subject, or subjects its agents and liaison services, to this kind of a risk.

Other nations adopt and pursue the concept of openness in government. Australia and New Zealand have recently established laws modeled on our Freedom of Information Act but they have exempted their intelligence agencies from the application of this law. Canada is considering such an act now and it seems quite clear that they too will not subject their intelligence agencies to it.

The matter of oversight, Mr. Chairman: It has been said that this act is part of the oversight process. Mr. Chairman, the Freedom of Information Act has never been an effective oversight mechanism for the intelligence community. Merely responding in a fragmentary way, much of the time misleading because it has to be fragmentary, does not provide any significant public protection nor any kind of real oversight. This fragmentary information obtainable under the Freedom of Information Act has not, cannot, and will not ever remotely compare in value with congressionally established oversight.

This is a responsibility given to the Select Committees on Intelligence in the Senate and the House. These two committees are specifically responsible for overseeing authorization of appropriations and operation of the various intelligence agencies. It is this system of vigilant and effective congressional oversight along with extensive executive branch review mechanisms which provides the means through which the American people are assured that the operation of their intelligence agencies is in accordance with applicable law.

Mr. Chairman, the President has stated his determination to enhance the Nation's intelligence capabilities and I am dedicated to work toward achieving that goal. The Congress must face the issue squarely and affirmatively and recognize that the current application of the Freedom of Information Act is inappropriate, that it is detrimental to the accomplishment of intelligence missions, and that it is unjustified by its insignificant public benefit.

Only a total exclusion of records created or maintained by the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency from all of the Freedom of Information Act requirements can, by completely eliminating the need to search and review records in response to requests and the wasteful and debilitating diversion of resources and critically needed skills, eliminate the danger of court-ordered release of properly classified information and reestablish the confidence of human sources and

foreign intelligence services which we must have to perform our mission.

Mr. Chairman, I would simply like to add this morning that nothing which I have said would indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them and to obtain this information when security considerations permit. I wish to state categorically that the intelligence community would continue full compliance with the Privacy Act, even if totally exempted from the Freedom of Information Act.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Casey.

We will turn to Senator Thurmond before we ask some questions.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Senator THURMOND. Mr. Casey, we are glad to have you with us today. I want to say that I am in accord with the position taken by Senator D'Amato. I think it is essential that steps be taken along this line, just as it is to pass the Agent Identities bill which we hope to do on October 6, I believe it is. I want to commend you for your interest in these important matters and what you are doing to correct deficiencies in the Freedom of Information Act that should have been corrected several years ago.

We are having a meeting in Armed Services which I must attend. I have a few questions here and I ask unanimous consent for you to answer those for the record, if that meets your approval.

Mr. CASEY. Very good.

Senator HATCH. Without objection, it is so ordered.

Mr. Casey, in testimony delivered last year the former Deputy CIA Director, Mr. Carlucci, stated that the representative of a foreign intelligence agency had sat in his office and informed him that his country would no longer be able to share information with the United States to the same degree because they feared that that information might be disclosed under the Freedom of Information Act.

You have indicated that this is a widespread problem and that some 15 intelligence groups or agencies across the world or around the world have refused to cooperate with our own CIA in exchanging intelligence information. I wonder if that refusal extends beyond exchanging to cooperating and participating in intelligence gathering processes?

Mr. CASEY. That is also true. I would not want to say 15 have refused. Some have refused but more frequently they make it clear they are going to limit what they do in providing us with information and in working together operationally.

Senator HATCH. In your opinion, to what extent, then, is the Freedom of Information Act affecting our relations with foreign sources of information?

Mr. CASEY. Very badly, very seriously.

Senator HATCH. Could you give us a percentage of, say, pre-1974 and post-1974, or at least some estimate as to what effect it has

really had on our foreign intelligence operations and our intelligence-gathering operations?

Mr. CASEY. Senator, I would not want off the top of my head to hazard what would have to be a guess as to the percentage. It is not easy to measure these things quantitatively.

Senator HATCH. Right.

Mr. CASEY. One essential item of information can be worth everything else. However, I can say there has been a steady erosion, and although we try to say that we do not think very much has gotten away—we are very vigilant, and that is why we put so much time on it—we are not always believed. They are not ready to risk their assets and risk their painfully developed sources, risk possible diplomatic embarrassment by providing us information which they know is subject to being requested, and they have to depend on people they do not know to properly sift it out.

Therefore, it is a very strong commitment to ask of people to place that bet on our vigilance in handling requests of this kind. We have had occasions where information has slipped out inadvertently and we have sustained grave embarrassment. We have incurred a cessation or a slowdown in relationships and we have suffered serious diplomatic embarrassment.

Senator HATCH. This may be sensitive but have there been instances of vital information being disclosed due to Freedom of Information Act requests?

Mr. CASEY. There have been. I would be glad to describe them in closed session.

Senator HATCH. I can anticipate, Mr. Casey, if we were to attempt to implement some of the suggestions you have made in your testimony, that some critics would allege that without the Freedom of Information Act to permit the media to check up on CIA activities, your agency might have no checks on it to prevent abuses. How would you respond to those critics?

Mr. CASEY. I would say that the oversight process, the appropriate and proper oversight process is that conducted by the two congressional committees, and that is very carefully done and responded to in great detail. It is also supplemented by mechanisms within the executive branch to oversee the operations and authorize the activities of the intelligence agencies.

I would further respond that from time to time we receive requests for particular items of information which then are looked at and sifted, and frequently, or usually, a substantial portion of the information requested is deleted. Therefore what is put out is fragmentary information, as likely to be misleading as accurate, which does not provide any assurance or any sufficient oversight comparable in any way with that provided by the congressional committees, the approved, the established oversight process.

It has been said that historians will not be able to get information you need. I think if you look at it—and we have looked at it—the record is that most of the information about intelligence activities has come out through testimony before the Church committee, the Pike committee and other digging by historians. The contribution made by what comes out under the Freedom of Information Act is probably very marginal.

Senator HATCH. You mentioned that 257,420 hours of labor were devoted to processing FOIA requests and litigation in the agency. Knowing that many of these requests must be cleared by high-level policymakers, I wonder if you could tell the subcommittee, if FOIA pulls vital personnel away from other crucial functions. And if so, how do you currently handle this problem?

Mr. CASEY. Well, we have to use trained and experienced personnel, as I said. It amounts to more than 4 percent of our operational people, our case officers, the people who are skilled intelligence operators. In addition, there are many administrative people, there are many analytical people involved in this process.

We spend more time on responding to freedom of information requests than we are able to spend on intelligence problems of the highest order. I would specify terrorism, narcotics, international economic policy: all of these things, we can afford to put less trained manpower on than we are required to put on by the Freedom of Information Act.

Senator HATCH. Those who opposed reducing the number of FOIA requests that the CIA would have to answer state that FOIA has helped the public learn of CIA operations like the Bay of Pigs invasion, mind-drug experiments, and other instances where the CIA is alleged to have stepped over the line of discretion. Could you comment on FOIA's role in these kinds of public interest stories?

Mr. CASEY. Well, the Bay of Pigs act became public knowledge and much of the background in relationship to it before there was a Freedom of Information Act. As to the other things, mail surveillance and so on, that all came to public attention through the proceedings of the congressional committees.

Senator HATCH. You mentioned that CIA spent over $3 million processing Freedom of Information Act requests. How much of this did you recover in fees charged to individuals who got the information, and how do you decide to waive fees, if you do?

Mr. CASEY. I think the recovery is nominal but I am going to see if Mr. Mayerfeld can respond to that.

Mr. MAYERFELD. It was $14,000 last year.

Senator HATCH. That is what you recovered in fees?

Mr. MAYERFELD. That is what we recovered.

Mr. CASEY. We are obviously not charging enough. [Laughter.]

Senator HATCH. That may be the answer. You never know.

Mr. CASEY. However, that does not go to the heart of our problem, which is the perception that the requirement to do this creates around the world and the way it impacts our operations' effectiveness.

Senator HATCH. Do you get many requests from foreign nationals?

Mr. CASEY. Yes. Yes, we do. We frequently do not know where these requests come from but we can identify a significant number of requests from foreign nationals, and there is no distinction. We have to respond to them all.

Senator HATCH. I see. Do you see any way to cut down on these requests from foreign nationals? I suppose they could get a U.S. citizen to make the request for them if they really needed the information.

Mr. CASEY. There are services in this city that do nothing else but represent people seeking information under the Freedom of Information Act, and we do not know who they represent.

I think when you talk about the amount recovered in fees, the way to really look at this is to think about the degree to which our effectiveness is reduced—4 percent of our operational people, other percentages, overall I do not know what the percentage would be—and apply that to the total budget we spend to perform this function, and think what that costs.

Senator HATCH. I do not want to dominate this. Senator Leahy is here.

Senator, do you have any questions?

Senator LEAHY. Feel free. I do, but go ahead, please.

Senator HATCH. No, go ahead.

Senator LEAHY. I was wondering, Mr. Casey, a number of these questions are similar to ones we have had in the Senate Intelligence Committee. As the CIA does have a national security exemption under the Freedom of Information Act, has any information ever been released by the CIA or disclosed over a CIA protest of a national security exemption? In other words, has there ever been a time when the CIA said they had a national security reason for withholding the information and they have still been required to give out the information?

Mr. CASEY. We have been brought to court a good many times, and there is one court decision which has ordered us to release information, classified information which we do not believe should be released.

As I said, however, Senator Leahy, before you arrived, I emphasized that the inadvertent release has been serious. A number of occasions have caused embarrassment and caused risk to lives and so on because the process of getting this information together from anywhere from 20 to 200 files and sifting through it is not a foolproof process. Therefore, I do not think that we can be sure that we are not releasing information, that information is not going out that should not go out.

Senator LEAHY. However, to date nothing—even the case you speak about is now on appeal so it is stayed pending that—to date nothing that the CIA has said that they want to keep back has actually been released.

Mr. CASEY. Except inadvertently.

Senator LEAHY. Unless inadvertently.

Mr. CASEY. Except inadvertently, that is correct. That is what I said.

Senator HATCH. That is a real problem, isn't it, inadvertent disclosure?

Mr. CASEY. A very substantial problem.

Senator LEAHY. Has there ever been a leak, to your knowledge, by any of the members of the Senate who sit on the Senate Intelligence Committee and have the right and the ability to ask some of the questions that would be involved in freedom of information requests?

Mr. CASEY. Not to my knowledge.

Senator LEAHY. What has been more of a problem as far as information being disclosed, in your estimation: the use of the FOIA or

the existence of moles or other spies within Western intelligence agencies?

Mr. CASEY. I can specify more precisely information that has been obtained through espionage from other intelligence agencies, and indeed from the U.S. Government. The adversaries are pretty effective at their espionage mission.

Senator LEAHY. I see by the paper this morning that the House has passed legislation making changes in the Intelligence Identities Protection Act. Of course, we have similar legislation pending here and we have looked at it within the Senate Intelligence Committee. The chairman of the House Intelligence Committee, Mr. Boland, has tried to tighten up the law with respect to agents' identities being disclosed, yet he voted against the final bill as it came through the House even though he has been a strong advocate of this tightening up, because he felt that there was one unacceptable change made to the so-called freedom of the press clause. Had Mr. Boland's position prevailed, would the CIA have been able to live with that legislation?

Mr. CASEY. Well, we think that either one of the bills, either the House bill or the Senate bill, would perform the job of properly stigmatizing and criminalizing the activity of disclosing the identity of agents who are undercover.

Senator LEAHY. However, you are speaking of the House bill as it was originally drafted by Congressman Boland, not the one that passed last night but the bill that was originally drafted by Congressman Boland, that bill would have been adequate for your needs?

Mr. CASEY. We prefer the Senate bill. We think, we are told, and we believe the Senate bill is more readily enforceable. It is my personal view that the Senate bill, having an objective standard and requiring the establishment of a pattern of activities, would be less likely to impinge upon the journalist doing a proper investigative job and writing a particular story. He could not be found to be engaged in a pattern of activity.

However, that is a difference of opinion. I have discussed it with most of the members of your committee, the Judiciary Committee, and I recognize that some people believe, and most journalists seem to believe, that the intent standard in the bill which was defeated in the House is preferable. My position is that both bills are better than the present situation where there is no protection but, if given a choice, we would prefer the Senate bill or the bill which was voted in the House yesterday, although we did not get involved in it.

Senator LEAHY. However, you could work with the original Boland language?

Mr. CASEY. The original Boland language would have provided a degree of protection which we would very much like to have.

Senator LEAHY. Can I ask another question, which I realize is somewhat speculative and hypothetical? I concur in and realize your need to get some kind of legislation in this field and to get it in a relatively short time. Assuming we all agree on that, would you also agree, however, that if we had legislation that was passed, put into place, people became aware of it, and then if that legislation were to be struck down by the courts, that in some ways that

would cause greater harm than not to have had the legislation in the first place?

Mr. CASEY. Yes, yes. I think if we had legislation that was struck down by the courts that would set us back to where we were, maybe even set us back further. There are different views about the sustainability of the two bills.

Senator LEAHY. I understand that.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

What you seem to say, Mr. Casey, is that the perception—whether or not the CIA has as grave a set of difficulties as you have explained or others have explained, or even if it did not—the perception that identities might be disclosed, information might be disseminated, is enough to cause difficulties in the international intelligence community.

Mr. CASEY. And in our ability to function. There are really three elements of damage here. The first is a loss of intelligence, a loss of secrecy, actual divulging of information which is harmful; the second is the burden and the cost of doing this job; and third is the perception and the impact of that perception on the willingness of foreign services and agents to cooperate with us and on the ability of our case officers to go out and recruit those agents. Of those three elements of damage, it is my view that the third, the matter of the perception which is conveyed, is the most damaging.

Senator HATCH. Thank you, Mr. Casey. We appreciate your testimony here today.

Mr. CASEY. Thank you.

[The prepared statement of Mr. Casey and answers to questions submitted by Senator Thurmond follow:]

PREPARED STATEMENT OF WILLIAM J. CASEY

Mr. Chairman, Members of the Subcommittee on the Constitution, it is a pleasure to have this opportunity to appear before you today to discuss the Freedom of Information Act's impact on the Intelligence Community. There are unique and particularly serious problems being experienced by the Central Intelligence, National Security, and Defense Intelligence Agencies under the FOIA which stem, in part, from the inherent contradiction of applying a statute designed to assure openness in Government to agencies whose work is necessarily secret. The adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit. Mr. Chairman, we need to address the fundamental question of whether it makes sense for the FOIA to be applicable to our Nation's most sensitive intelligence agencies.

The Freedom of Information Act was first passed in 1966. President Johnson described the Act as stemming from the principle that "a democracy works best when the people have all the information that the security of the Nation permits." The declared purpose of the Act was to broaden access to government information connected with activity impacting upon the public, with certain exceptions in areas in which Congress believed exemptions were warranted in the national interest. From 1966 until the Act was amended in 1974, there was no major impact upon the day to day functioning of the Intelligence Community. Then, in 1974, during the post-Watergate period of pressure for more openness in government, amendments to the FOIA were enacted over President Ford's veto. The Supreme Court's decision in EPA v. Mink was a key impetus for these amendments. The Supreme Court had ruled that an agency must examine classified documents before invoking the FOIA exemption permitting such documents to be withheld from disclosure, but that it was not for the courts to rule on whether the classification itself might be unwarranted.

The 1974 amendments made several fundamental changes in the Act, the most notable of which:

1) Required that reasonably segregable portions of a document not falling under the Act's exemptions be provided to the requester; and

2) Gave the courts authority to review agency determinations that records were withholdable under the Act. The courts have subsequently placed an enormous burden upon the intelligence agencies to justify classification claims. In one case a federal court has overruled the judgment of professional intelligence officers that information is properly classified.

The amendments led to an explosion in FOIA requests directed at the CIA, and a corresponding increase in associated litigation. Resources and manpower devoted to FOIA matters have, of course, increased tremendously since the mid-1970's. The CIA's latest annual report on its administration of the Act contains the following statistics for calendar year 1980:

-- 1212 new FOIA requests were logged during 1980.

-- 257,420.5 actual person-hours of labor (or 144 person-years) were devoted to the processing of Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation, as compared with the 110 person-years of labor devoted in 1979. More than half of these resources were devoted to the processing of requests for subject matter information under the FOIA.

-- Over $3 million was expended in personnel costs for processing, appeals, and litigation related to these requests. About two-thirds of this amount was spent on FOIA requests.

Mr. Chairman, if gross personnel and resource figures represented the major problems then there would be an obvious solution. The last seven years have shown, however, that the Intelligence Community faces other problems even more important and far more unique. These problems, which I shall outline, stem from the fundamental incompatibility of applying the FOIA to intellgience agencies whose missions must be conducted in secret.

The search and review of records in response to FOIA requests poses a special set of problems. The CIA's records systems, for example, are an integral part of the Agency's security system. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Under the "need to know" principle CIA employees normally have access only to information necessary to perform their assignments, but the process of compiling documents responsive to FOIA requests is incompatible with good "need to know" practices.

The search for information responsive to an FOIA request is a time-consuming task. A relatively simple FOIA request may require as many as 21 CIA record systems to be searched, a difficult request over 100. I must emphasize, however, that it is not the quantity of time and effort devoted to FOIA that is of ultimate concern to us. It is rather the level of employee who must become involved in the review process. By this I mean the types of highly trained people who must participate in the processing of an FOIA request.

When we locate records in response to an FOIA request, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld, in accordance with applicable FOIA exemptions, in order to protect matters such as the security of CIA operations or the identities of intelligence sources. In other government agencies the review of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources. In some circumstances mere acknowledgment of the fact that CIA has any information on a particular subject or has engaged in a particular type of activity could be enough to place the source of that information in danger, compromise ongoing intelligence operations, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive matters if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of intelligence information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve participation in, or management of, vital programs of intelligence collection and analysis for the President and our foreign policymaking establishment. Experienced

operations officers and analysts are not commodities that can be purchased on the open market. It takes years to develop first-class intelligence officers. Again, let me emphasize that these reviewing officers are not FOIA professionals, they are intelligence officers who are being diverted from their primary duties. This diversion is impacting adversely upon the fulfillment of vital intelligence missions.

Mr. Chairman, efforts to fulfill our intelligence missions while subject to the provisions of the FOIA have placed the CIA in a vicious cycle. Intelligence information must be processed and analyzed quickly if the President, the Cabinet, and the Congress are to receive the latest and most accurate assessments of foreign developments. The need for up-to-the-minute information frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act. This results in the Agency being sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process. The defense of such suits, as well as those that are brought because of a denial of the information requested, requires the time and effort not only of lawyers at the Agency and the Department of Justice, but also of intelligence officers directly concerned with the request in question. Factual submissions must be presented by substantive intelligence officers, again diverting them from their primary duties. Therefore, despite an increase in the manpower devoted to FOIA review in 1980, the backlog of unanswered requests increased by 400 cases. Mr. Chairman, I am concerned that when the work of senior intelligence officers is diverted to FOIA concerns because information must be reviewed, or because court affidavits must be prepared under strict time constraints to justify a delayed response or a previous denial of information, the ability of our Nation to formulate an informed and successful foreign policy suffers.

The CIA has been sued 198 times under the FOIA. The result, with one exception, has been judicial affirmance of the claimed national security exemption. One recent example is the decision in a lawsuit brought by Phillip Agee against the CIA, FBI, NSA, Department of State,

and Department of Justice. In his opinion, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia stated: "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." The fact remains, however, that judges with no expertise in the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. In the one exception I mentioned, the Court of Appeals has upheld a district court decision specifically overruling a CIA classification determination. Final resolution of this case is still pending. While we have succeeded thus far in protecting sensitive national security information, our litigation record has been achieved at an enormous cost in the kind of quality resources which I described earlier.

Mr. Chairman, I would like to add one other point which is related to the FOIA process. The Freedom of Information Act currently contains exemptions for classified documents and other matters that are set forth as exempt from disclosure. These exemptions have generally been adequate to protect sensitive national security information. Even with the best of review systems using the best talent, however, there are hazards, because human error is always a possibility. Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive intelligence information. These unintentional disclosures are constant reminders of the risk which will be present so long as the intelligence agencies are subject to the Act. The handling of FOIA requests involving intelligence information by other agencies has also resulted in some serious compromises of classified information relating to intelligence sources and methods. Compoundng these problems are attempts by requesters to gain additional classified information based upon these compromises.

Mr. Chairman, the FOIA further impedes our nation's intelligence efforts through the perception it has created overseas. While the perception of our country's inability to keep secrets may be caused by leaks, unreviewed publications by former officials and the like, it is

the FOIA that is viewed as the crux of this problem. Individual human sources and foreign intelligence services are aware of the Act; they view it as a threat to our country's ability to maintain the confidentiality of its intelligence sources, and to protect the information they provide. An intelligence agency cannot operate effectively under such conditions. Human intelligence is as important today as it has ever been. To obtain this intelligence it is vital that there be confidence in the ability of the United States Government to honor assurances of secrecy. It must be remembered that many individuals who cooperate with the intelligence efforts of the United States do so at great personal risk. Identification as a CIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture, or death. We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to maintain such commitments, despite our explanations that the Act provides exemptions which allow for the safekeeping of sensitive information. The concept of an intelligence agency being subject to an openness in government statute is not uniformly understood by individuals and intelligence services abroad. It has been necessary to spend a great deal of time attempting to convince foreign intelligence services that they should not discontinue their liaison relationships with us because of the FOIA. The very fact that CIA files are subject to search and review for information which is releasable is extremely disturbing to our sources. There have been many cases in which individuals have refused to cooperate with us, diminished their level of cooperation, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. What we will never know, Mr. Chairman, is how much valuable information has been lost to the United States due to the reluctance of potential human sources to even begin a relationship.

Mr. Chairman, beginning in 1947 this country made a conscious decison that it needed intelligence agencies as part of its national

security fabric. The application of the FOIA to these agencies is causing a weakness in that fabric. It must be remembered that intelligence activities are focused on the acquisition of sensitive information abroad for foreign policymakers, not for the general public. Information which is released under the Act is generally extremely fragmentary and it can often be misleading. Mr. Chairman, I would note that certain organizations have published lists of books and articles said to be of public interest which supposedly were based on information released by intelligence agencies under the FOIA. The argument is made that these materials could not have been published without the FOIA. I believe that such claims are grossly exaggerated. The FOIA has not resulted in the revelation of fundamental information but has instead been used to garner additional details about subject matter which was originally either revealed by one of the intelligence agencies on its own, or in the course of investigations such as those conducted by the Rockfeller Commission or the Church Committee.

Mr. Chairman, the FOIA has never been an effective oversight mechanism for the Intelligence Community and the idea that it is needed to ensure that the abuses and excesses of the past do not recur ought to be laid to rest once and for all. The fragmentary information obtainable under the FOIA has not, cannot, and will not ever remotely compare in value with the congressionally established oversight responsibility which has been given to the select committees on intelligence in the Senate and House of Representatives. These two committees are specifically responsible for overseeing authorizations of appropriations and operations of the various intelligence agencies. I believe that it is fair to say that no other agencies in the Government are subject to such close congressional scrutiny on a permanent, ongoing basis. It is this system of vigilant and effective congressional oversight, along with extensive Executive branch review mechanisms, which provides the means through which the American people are assured that the operation of their intelligence agencies is in accordance with applicable law.

Mr. Chairman, the President has stated his determination to

enhance the Nation's intelligence capabilities, and I am committed to work toward achieving that goal. To do this, our intelligence agencies must be able to focus their energies on the timely and accurate gathering and analysis of information in a manner which insures the secrecy of the sources and content of that information. For the reasons I have stated, I believe the current application of the FOIA is inappropriate, that it is detrimental to the accomplishment of intelligence missions, and that it is unjustified by its insignificant public benefit.

Several bills introduced this session would impact on the FOIA's applicability to the Intelligence Community and to Federal law enforcement agencies. S. 587, introduced by you, Mr. Chairman, would appear to meet the needs of the law enforcement agencies. While the portions of the Bill which would apply to the intelligence agencies would be of benefit, the fundamental problems which I have just outlined would not be fully alleviated. Senator D'Amato's Bill, S. 1235, is a laudable legislative proposal which seeks to relieve the CIA of some of the burdens associated with the FOIA by strengthening the exemptions in the Act under which information can be withheld from disclosure. Unfortunately, Mr. Chairman, I do not believe that the Intelligence Community's problems under the FOIA can be substantially alleviated by strengthening the grounds upon which information can be withheld from public disclosure under the Act. Senator Chafee's Bill, S. 1273, takes a different, more promising approach in its effort to seal off certain categories of files from the entire FOIA process, including search and review. I believe that Senator Chafee's Bill, if enacted, could have a major positive impact. But Mr. Chairman, I also believe that the time has come for the Congress to face the issue squarely and definitively, and to recognize that only a total exclusion of records created or maintained by the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency from all of the Freedom of Information Act's requirements can, by completely eliminating the need to search and review records in response to FOIA requests, end the wasteful and debilitating diversion of resources

and critically needed skills, eliminate the danger of court-ordered release of properly classified information, and regain the confidence of human sources and foreign intelligence services.

Mr. Chairman, I would like to add one footnote to my testimony before you today. Nothing which I have said should be construed to indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them, and to obtain this information when security considerations permit. I wish to state categorically that the Intelligence Community would continue full compliance with the Privacy Act even if totally excluded from the FOIA.

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Central Intelligence Agency

Washington, D.C. 20505

7 October 1981

Honorable Orrin G. Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before the Subcommittee on 24 September, Senator Thurmond submitted several questions for my response. I appreciate the opportunity to respond to Senator Thurmond and I submit these questions and answers to you for inclusion in the record.

I wish to take this opportunity to commend you for your leadership in chairing the several days of hearings on the Freedom of Information Act. As I indicated in my testimony, I feel very strongly that the FOIA is causing serious damage to the ability of our intelligence agencies to fulfill their intelligence missions. I trust that together we will achieve the necessary and appropriate solution to this problem.

Sincerely,

William J. Casey
Director of Central Intelligence

Enclosure

HEARING BEFORE THE SENATE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
CONCERNING THE FREEDOM OF INFORMATION ACT
24 SEPTEMBER 1981

ANSWERS TO QUESTIONS SUBMITTED
FOR THE RECORD TO MR. WILLIAM CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE
BY SENATOR STROM THURMOND

1. Mr. Casey, approximately how many work years does the CIA spend in a year responding to FOIA requests and declassifying information?

A: In calendar year 1979, 110 work years were spent processing Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals and litigation. This increased to 144 work years in calendar year 1980.

2. Mr. Casey, we have legislation before the committee that would place a moratorium on the application of the Freedom of Information Act to the CIA. What period of time would be reasonable and what reasons can you give the Committee for a moratorium?

A: We believe that only a total exclusion from the FOIA of CIA, as well as the NSA and DIA, will resolve the serious problems posed by the application of the FOIA to these agencies. Intelligence agencies have unique and highly sensitive missions, the performance of which requires an environment of secrecy and security. There is an inherent contradiction in applying an openness in government statute to our intelligence agencies. At the CIA, the search for records in response to FOIA requests breaks down the decentralized and compartmented system of records basic to the security of sensitive information. Review of the records gathered together frequently requires the time and expertise of highly trained intelligence officers having substantive knowledge of the material involved so as to guard against inadvertent disclosure of classified information. Nonetheless, human error is always a possibility and inadvertent disclosures of sensitive information have occurred. Last, but not least, is the symbolism the FOIA carries overseas in the perception that our intelligence agencies are no longer able to guarantee the confidentiality of information entrusted to the United States.

3. Mr. Casey, one loophole in the current Freedom of Information Act is the ability of foreign nationals to make requests for information held by both the CIA and the FBI. Should this provision in the law be changed?

A: While the law currently requires requests from foreign nationals to be handled in the same manner as requests from American citizens, I do not believe that limiting the availability of the FOIA to U.S. citizens and permanent resident aliens will solve this problem. Such an amendment would only result in foreign nationals and foreign intelligence services submitting their requests through witting or unwitting Americans. Only a total exclusion of our sensitive intelligence agencies from the Act will prevent such requests.

4. Mr. Casey, one of the criticisms of the current Freedom of Information law among intelligence-gathering agencies is that friendly foreign government intelligence agencies are hesitant to share vital information with us because of the potential for disclosure under the FOIA. To what extent is this true, and what changes can the Congress make to improve our intelligence-gathering capabilities?

A: The hesitancy of friendly foreign government intelligence agencies to share information with this country's intelligence-gathering apparatus has become evident over the past few years and is continuing today. I would be glad to share specific examples in a classified session. Such a reluctance among those with whom we need to have continuous and cooperative relationships is one important reason why a total CIA, NSA, and DIA exclusion from the FOIA is necessary for the effective performance of our intelligence mission.

Senator HATCH. Senator D'Amato, we will submit some questions to you but we appreciate your being here as well. We appreciate your activity on this bill.

Senator D'AMATO. Thank you very much.

Senator HATCH. Thank you so much.

The subcommittee would next like to welcome Mr. Morton H. Halperin, who is testifying today on behalf of the American Civil Liberties Union. Mr. Halperin is currently the director of the Center for National Security Studies, which is jointly sponsored by the American Civil Liberties Union and the Fund for Peace. He is a former staff member for the National Security Council, a former Deputy Assistant Secretary of Defense for the Nixon administration, and the author of several books and articles dealing with foreign policy and intelligence.

We are honored to have you with us here today, Mr. Halperin, and we will look forward to your testimony as well.

STATEMENT OF MORTON H. HALPERIN, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY ALLAN ROBERT ADLER

Mr. HALPERIN. Thank you, Mr. Chairman. I appreciate the opportunity to testify along with Allan Adler on behalf of the American Civil Liberties Union. I would like to——

Senator LEAHY. Excuse me, Mr. Chairman. Before Mr. Halperin starts, I have an amendment on the floor. I am going to have to leave. I wonder if I might ask permission to quite possibly submit one or two questions to Mr. Halperin subsequently for the record, if that would be OK. with Mr. Halperin.

Senator HATCH. Without objection, we will keep the record open for questions for all witnesses so any member of the committee can submit questions.

Senator LEAHY. I apologize, Mr. Halperin. This is the second time you have testified that I have been called away. I had hoped very much to be able to hear your testimony and I apologize.

Mr. HALPERIN. I appreciate your interest, Senator. Thank you.

Senator HATCH. Go ahead, Mr. Halperin.

Mr. HALPERIN. I would like to ask that our statement be made part of the record.

Senator HATCH. Without objection, we will put the full statement in the record.

Mr. HALPERIN. What we would like to do is, in effect, summarize it by commenting first briefly on Mr. Casey's statement and his testimony, and then Mr. Adler will comment briefly on Senator D'Amato's bill.

There seems to be a new element this year in the CIA's position on this issue. They are giving much more emphasis than they did in the past to the problem of the burden of examining files, which arises from the fact that they operate under a compartmentalized system and that the review of the documents has to be accomplished by very senior officials of the Agency.

Senator HATCH. Let me say this: I have been, I guess, involved with this since 1977 when we started some of the hearings on this. Everyone who has come in has complained that it is taking extensive—the FBI was the first to really start establishing that it is just

taking extensive professional staff to be able to just meet the surge of freedom of information requests, not so much from the media, which really does not utilize the system, as much as perhaps a whole variety of people throughout society and throughout foreign lands.

I was interested in that, too, though. He did make the point that it is becoming an increasingly difficult burden. I think he said 5 percent of their total intelligence personnel are being utilized just to handle freedom of information requests. I kind of got the impression from what he said that the reason they have to use so many professionals on this is because they are just terrified that they might give up some material that really should not be disclosed, that might be crucial to our country's intelligence system. However, that was an interesting comment.

Mr. HALPERIN. Yes; I think the CIA has problems distinct from many other agencies—there are two differences. One is that in most other agencies the review process can be done by people who are hired simply to review documents, which I think cannot be done for many CIA documents. Second is that the percentage of material which the CIA ends up releasing is far smaller than many other agencies because they have more legitimate claims to secrecy for many of their documents.

I think those are real problems and I think that a solution to them should be found. I think a solution to them can be found either by amendments to the act or by agreed administrative changes in the procedures under which they operate.

Senator HATCH. Do you think any of the present bills——

Mr. HALPERIN. I do not think any of the present bills solve that problem, nor do I think the total exemption that the CIA recommends is the appropriate solution to that problem.

Senator HATCH. You then would dispute Mr. Casey, that there should not be an exemption for intelligence gathering, for CIA activities.

Mr. HALPERIN. Yes; I would think that there should not be a total exemption for the Agency. I think that this problem they have identified is real, and I think it can be handled either by amendments to the act, or by administrative changes, or by some combination which, for example, might permit sampling of documents or might permit the exclusion, at least at an initial stage, of the gathering of all of the files in relation to a request.

For example, the CIA has adopted a procedure now which they refer to, I think, as the GLOMAR procedure, whereby if you request documents on a subject that they know they will not confirm or deny the existence of documents on, they do not search for the documents, gather them all together, and then tell you that they will not confirm or deny it. They simply write back and say, "We will not confirm or deny the existence."

For example, if you write in and ask for all the documents from colonels or higher in the Soviet military provided to the CIA in the last 2 years, the CIA does not gather together any such files and then write back and say, "We will not confirm or deny." They simply write back and say, "We are not going to search because we know that even if we had anything, we would not confirm or deny its existence."

I think that it might be possible to extend that technique further to certain kinds of files and documents so that the Agency is not in a position where, in response to a request, it has to gather everything together, search through it, and then not release anything. However, I think the Draconian solution of a total exemption does not deal with that problem, nor—as I agree with Mr. Casey—nor do any of the bills presently before the Congress deal with it because they simply change the standard and they would still have to bring all the files together to search.

As far as the total exemption is concerned, let me say that I think the Agency has only begun to think through the very substantial implications of that proposal. It is not yet, as far as I understand it, an dministration position. I suspect part of the reason for that is that it is very hard to know where to draw the line.

It started out as a proposal for an exemption for the CIA. Then it became a proposal for an exemption for the CIA and the National Security Agency. Now Mr. Casey—in contrast, as I recall, to Admiral Innan's testimony before the Intelligence Committee—has endorsed the Defense Intelligence Agency's request for a similar total exemption.

Therefore, the question is where would you draw the line. There are other intelligence agencies within the Defense Department, some of whose existence is secret, and the question of how you would exempt them, or if you would want to totally exempt them, is, I think, very complicated. What about the Bureau of Intelligence and Research in the State Department? Why should it not be exempt? What about the counterintelligence functions of the FBI?

Then you get a separate question: What about documents or information which are developed in these agencies and passed to the National Security Council or the State Department or the Defense Department outside its intelligence agencies? Mr. Casey now proposes to focus on records "created or maintained" by these agencies.

Well, that would produce the situation where a document developed by the Bureau of Intelligence and Research but in the files of the CIA would not be releasable from the CIA but would from the Bureau of Intelligence and Research. Somehow all of these other agencies would have to identify and clearly mark all information that was created by the CIA, and that information would presumably have to be exempt as well under the proposal that Mr. Casey has developed.

I think that would produce enormous administrative chaos. It would produce also, I think, a tendency on the part of the intelligence agencies not to want to share information with the policy agencies because that information then would become commingled and might be subject to release.

Therefore, apart from my belief that Congress was right in 1974 when it said that all agencies should be subject to the Freedom of Information Act—and the CIA I think has yet to make a case that such a Draconian solution is appropriate—there are a number of very complicated administrative problems regarding where you draw the line and how you draw the line that the Agency has not yet begun to address, and which I think, if they were considered carefully, would show that the only solution in this direction is

simply to exempt all national security information. That would have very substantial effects on our system of government.

Let me briefly touch on two other subjects. The CIA says that the information released under the Freedom of Information Act is not of any great value for public debate and public understanding of the CIA. Mr. Casey was asked about the Bay of Pigs and drug testing, and he said correctly about both of those that the fact that they had taken place became publicly known through channels other than the Freedom of Information Act. In the case of the Bay of Pigs, we all read about it in the newspaper. In the case of drug testing, it came out in the Church committee hearings and report.

However, the fact is that very, very substantial detail about both of those programs was released under the Freedom of Information Act. There is a book which was written on the drug-testing program which could not have been written without the Freedom of Information Act. It was written based on volumes and volumes of documents released under the Freedom of Information Act. There is a very good book on the Bay of Pigs which, again, could not have been written without access to documents which were made available under the Freedom of Information Act.

I could give you many other examples where it is true that the original fact that something was going on that deserved investigation came out through a leak or a Government announcement or a hearing before a congressional committee. However, the fact is that much additional information, additional information which we believe is crucial to understanding those events, came out under the Freedom of Information Act.

Nobody has ever suggested that it is a substitute for congressional oversight or the important work of the Intelligence Committees. What we do believe is that it is an important supplement.

Now, finally, on the question of perception, this is a very slippery slope, as we are discovering again. In the last Congress, the CIA said that the provisions which are now embodied in Senator Chafee's bill would solve the perception problem. Mr. Casey now says that it would not solve the perception problem and we need to go all the way to a total exemption. Nonetheless, he then excludes personal files from total exemption.

Well, if one has to say to an agent that one is recruiting, "We will not release your information except if it is in the file of an American who requests it," that again raises a loophole which I think suggests that there is no way to totally solve this problem.

Moreover, as the CIA now candidly admits, the problem of its ability to keep secrets and the perception of other intelligence agencies about its ability to keep things secret is a function of a number of other things, including the Freedom of Information Act: Of spies within the Government who sell information; of leaks of information, often from high-level policy officials.

Therefore, there is no way to assure a potential recruit that nothing will come out. Insofar as there is a perception problem connected with the Freedom of Information Act, I think it has to be handled by dealing with the perception rather than the Draconian measure of a total exemption from the act.

I would like to ask Mr. Adler to comment very briefly on the specific provisions of Senator D'Amato's bill.

Mr. ADLER. Mr. Chairman, with all due respect to Senator D'Amato, we strongly disagree with his characterization of the impact of his bill, S. 1235. Basically I would just like to briefly address two particular provisions in the bill.

One provision, as Senator D'Amato mentioned, would in fact strip the Federal courts of jurisdiction to review decisions by the Central Intelligence Agency to withhold certain information requested pursuant to the Freedom of Information Act. The only exception would be that courts would be permitted to review withholding decisions where they involved personnel records of an individual, the disclosure of which is necessary for obtaining employment outside the Agency.

In plain language, that would seem to indicate that the only individuals who would have recourse to judicial review for an agency decision to deny access to information would be former CIA employees. I would note that Philip Agee would be able to avail himself of judicial review, while ordinary American citizens and even Members of Congress could not.

Eliminating judicial review goes right to the heart of the act. As Senator D'Amato said, de novo judicial review was the primary change made in the Freedom of Information Act in 1974. The change was viewed necessary by Congress as a result of a Supreme Court decision in the case *EPA* v. *Mink*, where the Court concluded with some reluctance that under the original language of the Freedom of Information Act the mere fact of classification of a document was sufficient to justify withholding and to put it beyond judicial review.

Justice Stewart, concurring in that Court's opinion, said that the FOIA, as originally enacted and thus construed by the Court, provided "no means to question any Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." In 1974, when Congress amended the act to include a de novo judicial review provision, it was precisely this kind of result that Congress was trying to prevent from occurring in the future.

I would add that while there has been a good deal of discussion by the CIA about its problems with judicial review; namely the belief that Federal judges lack proper sensitivity and sophistication about intelligence matters and that in some instances information of a sensitive nature is inadvertently released, I would urge this committee to make a careful study of the case law in this area.

A review of the actual court decisions will show clearly that the courts have been extremely deferential to the judgments made by the agencies regarding classification of information. In fact, they have generally given a broad reading to the act's requirement that judges give substantial weight to explanations given by the agencies for withholding certain documents.

All of this goes directly to the problem of classification of information. At the time of the 1974 amendments, Congress was concerned about pervasive overclassification of information. That problem has not changed. During the last 3 years the General Accounting Office has done five major studies of the way the classification system has worked, and in each of those studies has concluded that there is still a great deal of overclassification of information.

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As recently as July, Presidential adviser Edwin Meese in an interview with the Washington Post said that overclassification is still a very large problem in our Government. Without judicial review of classification under the Executive order, we submit that problem will continue.

The other section of Senator D'Amato's bill that takes us back to the problems of pre-1974 Freedom of Information Act is a provision which would require that if any portion of a record is exempt, then the whole record is exempt. This would mean that even if the information was not classified, if it was not sufficiently sensitive to justify classification pursuant to standards and procedures designed by the President, the CIA still would be able to withhold the information from the public.

If you look at S. 235 in light of these two provisions, it is evident that the bill—in effect, if not by design—is a total exemption for the CIA from the Freedom of Information Act.

The only other point that I would make in reviewing this legislation and similar proposals is that Congress, particularly as a result of the 1974 amendments to the Freedom of Information Act, has carefully struck a balance in the Freedom of Information Act which is directly responsive to the system of government set out in our Constitution.

When the Congress enacted the Freedom of Information Act, it was implementing its understanding of the first amendment to the Constitution which gives the public a right to know about the workings and operations of Government. It set procedures and standards whereby the public could gain access to the records of Government. Of course, since the first amendment is not absolute neither was the public's right to know, and so there were exemptions placed in the act, including one for national security information.

Recognition that our constitutional system of government has a tripartite balance between the courts, the legislature, and the executive branch is apparent in the Freedom of Information Act. The legislature set the procedures and standards of the Freedom of Information Act. The executive branch provides the classification of information which requires protection in the interests of national security. The courts then review those decisions to see if the executive branch has followed its own standards as well as the mandate of Congress. That is the way the Constitution intended such a system to function.

Mr. HALPERIN. Mr. Chairman, we would of course be glad to answer your questions.

Senator HATCH. At the time that the Freedom of Information Act was enacted in 1966, congressional oversight of the CIA was almost and virtually nonexistent. Today, on the other hand, the CIA is closely scrutinized by many congressional committees.

Has this reduced the need for the Freedom of Information Act as an oversight tool to, as some people say, keep the CIA in line? Was Mr. Casey's comment about the congressional oversight process and the other checks on the CIA through both the legislative and executive branches basically acceptable to you?

Mr. HALPERIN. Well, I think it is true that there is much more congressional oversight than there was before, and I think it is

true that the primary check that we now have on the intelligence agencies is the oversight committees, but I think that the Freedom of Information Act and the ability to request information under that act does play an important role as an adjunct and as a supplement to congressional oversight.

I think it is also the case, as I have suggested, that we now have 7 years of experience with the amended act. I think there is room for seeking changes in the act which will reduce this burden on the agency, and I think those changes are more acceptable now precisely because there is this congressional oversight system in effect.

Senator HATCH. What kind of information at the CIA would you believe should not be subject to the requests of the Freedom of Information Act?

Mr. HALPERIN. Well, there was a bill introduced last year by Congressman Pryor in the House which proposed to deal with the perception problem by exempting information obtained in confidence from a foreign confidential source. I think that if the CIA promises confidentiality to a foreign government or a foreign intelligence service and receives information in confidence from them, that should not be—and I do not think it is now—subject to release under the Freedom of Information Act.

I think there may be a way to have such information identified, for example, agent reports, and have those not subject to search and review line-by-line by the agency in response to a request. I think those documents one might be able to find a way, as an example, to exempt from the administrative burden that the agency now discusses, since in fact the agency has never to my knowledge released a single line from any such document nor has anybody ever suggested that they should be required to do so.

Senator HATCH. Do you think that we can really rely on the regulations governing classification to protect all information?

Mr. HALPERIN. I think the current regulations are not sufficient. I think it would be possible for the executive branch to alter the Executive order to provide this kind of protection. All Congress has done as far as national security information is to say that the courts should uphold the withholding of any information properly classified by procedures and standards established by the President. Therefore, I think there is room to do this by Executive order but I think it is also possible to do it by carefully crafted legislation.

Senator HATCH. When the Freedom of Information Act was argued on the floor of the Senate and the House, it was argued that it would only cost about $50,000 a year to meet the Freedom of Information Act requests. Today it costs somewhere between $50 million and several times that every year, according to past testimony on this committee. Do you recommend that we change the law so that we can adequately charge fees, so that this is not such a heavy burden to the taxpayers?

Mr. HALPERIN. That is of course not a special problem for the CIA. They spend——

Senator HATCH. He said $3 million.

Mr. HALPERIN. They spend less than the Coast Guard, for example. What percentage of their budget they spend of course we do

not know, since we do not know what size their budget is, but it appears to be less of a percentage than many agencies.

I think the way to go in exploring that problem, Senator, is to distinguish between commercial requests made for commercial purposes—which I think was not anybody's original intention under the Freedom of Information Act—to alter the law so that the full cost of not only search and copying but also review can be charged when a request is made for a commercial purpose, while at the same time toughening up the law so that what I think was clearly Congress, intent in 1974—that fees be waived when requests are made for public interest purposes—to put some more teeth in that.

Therefore, on the one hand if a journalist or a historian or a public interest group is seeking information to make it public for public purposes, there ought to be a heavy presumption that all fees are waived. On the other hand, where a request is made for a commercial purpose there ought to be a heavy presumption that all charges including review are made. Of course, now, you would want exceptions where there was a suggestion that requests were frivolous or so on but I think that basically that is the way to go in dealing with the cost problem.

Senator HATCH. Thank you, gentlemen. I think you have been very helpful to the committee and we appreciate your efforts.

Mr. HALPERIN. Thank you.

[The prepared statements of Mr. Halperin and Mr. Adler follow:]

PREPARED STATEMENT OF MORTON H. HALPERIN AND ALLAN ROBERT ADLER

Mr. Chairman and Members of the Committee:

On behalf of the American Civil Liberties Union, we want to thank you for inviting us here today to discuss legislative proposals which, if enacted, would exempt almost all CIA records from the disclosure requirements of the Freedom of Information Act and would insulate the CIA's determinations from judicial review.

The ACLU, through its Center for National Security Studies, has carefully analyzed the arguments put forward by the CIA for exemption from the FOIA. That study leads to the following conclusions:*

> -- The intelligence community has ample authority under the current FOIA to protect classified information and intelligence sources and methods. Indeed the CIA has used the Act effectively and to date not one sentence has been released to the public under a court order in circumstances where the CIA has argued that release could injure the national security.
>
> -- The problem as the CIA candidly admits is really one of "perception" or "misperception" on the part of foreign intelligence officers and foreign sources of information that secrets are not protectable under the FOIA. But this misperception cannot be solved by amending the FOIA since the perception is also based on the reality of leaks, lapses in security, congressional oversight, the publication of CIA memoirs (censored and uncensored), civil lawsuits, CIA abandonment of its agents and allies in Vietnam and elsewhere, and other factors having nothing to do with the FOIA. In light of all of the ways in which CIA information is from time to time actually compromised, it is unwarranted to focus on the phantom factor that federal judges will irresponsibly reveal information.
>
> -- More important, the CIA understates the adverse impact of the exemption on the public's right to know. Considerable amounts of information regarding CIA and other intelligence operations have been released by the CIA under the FOIA. Through the FOIA, the public has learned more about the Bay of Pigs invasion, mind-drug experiments, and CIA spying on Americans.

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*The Center for National Security Studies, a project of the ACLU Foundation and the Fund for Peace, has prepared a detailed analysis of the CIA's arguments in favor of narrowing FOIA access to Agency records. Although produced in response to legislation proposed in the last Congress, the Report is both timely and relevant with respect to the two bills that the Committee is considering today. We ask that this Report, which is attached to our prepared statement, be made part of your hearing record.

Much of the information was not included in congressional reports on the CIA and some of it makes clear that CIA operations were more extensive than official investigations had indicated.

-- Congressional oversight is no substitute for public accountability of the CIA under FOIA. The CIA says it is willing to give all information to the Congress for purposes of oversight and that this is further reason for granting the exemption. Yet disclosures under the FOIA have shown that the CIA did not turn over all information about past operations to the Congress and congressional committees have not always made relevant information available to the public. The FOIA has independently added to the public record of the agencies.

Let us turn now to the importance of the FOIA in enabling public interest groups like CNSS to better monitor the activities of the CIA.

The ACLU, primarily through the Center for National Security Studies, has made extensive use of the FOIA in seeking to learn about the activities of the CIA and other intelligence agencies and to supplement the information provided to Congressional committees and made public by those committees.

On February 19, 1975, when the 1974 amendments to the FOIA went into effect, CNSS filed some 5 requests with the CIA. A few months later, CNSS filed four lawsuits for documents withheld by the CIA and other agencies. Since then we have made more than 50 requests and filed some 15 lawsuits on behalf of CNSS and other groups through our litigation project, the ACLU Project on National Security. We regularly review documents released by the CIA and other agencies to determine what new information they contain. Summaries are printed in the CNSS monthly, First Principles, and in a CNSS report, From Official Files, which is regularly updated and widely reprinted. (See Appendix C of the attached report.)

We also make use of documents released under the FOIA in litigation and in testimony which we present regularly at the requests of a number of congressional committees including this Committee and its House counterpart. The documents are also used in CNSS reports and in books and articles written by the CNSS staff.

Put simply, the FOIA is essential to the activities of CNSS and the ACLU Project on National Security. Any amendment which did not provide for full judicial review would be fatal to the effective functioning of CNSS and we believe to all efforts on the part of citizen groups to monitor the activities of the CIA and to participate in the process of developing charters and monitoring compliance with them.

Let us explain.

Prior to 1975, the CIA was essentially exempt from the FOIA. When we or others made requests to the Agency, we were told that all of its files were classified and were exempt from disclosure by statute. The Agency was essentially free to determine what to release and what not to release. What it released was essentially self-serving.

For example, in one of his few public statements, CIA Director Richard Helms told the American people that the CIA did not spy on Americans; he repeated the same information before the Senate Foreign Relations Committee. When he made those statements there was no way that anyone could test their accuracy.

One of the first documents which CNSS requested was the so-called Vail Report prepared by William Colby, then the CIA Director for President Ford, describing the CIA's surveillance of Americans in light of the New York Times story reporting what it called a massive illegal surveillance program. After the CIA refused to release a word of the report or its appendices, the Project filed suit. On the eve of a deposition of a senior CIA official, the entire report was released.

When asked at the deposition why the CIA had believed that it could withhold the entire report, the CIA official explained candidly that it was the "policy" of the agency not to discuss its activities in the United States or its surveillance of Americans. That "policy" ended that day. It would, we suggest, be reinstituted the day that Congress passes the kind of sweeping amendment that the CIA seeks.

One of the things which suggests that the CIA would revert to its old ways is its continued refusal to release material related to the surveillance of Americans unless it is specifically demanded under the FOIA. One very recent example will suffice.

Executive Order 12036, under which the CIA conducts surveillance of Americans, requires the agencies to develop implementing directives and secure approval for them from the Attorney General. The CIA drafted such guidelines and they were approved in August of 1979. Yet despite the fact that the guidelines are unclassified, the CIA neither made them public nor even announced they existed. When asked to release them, the agency declined to do so until a formal request was made under the FOIA. Even then the agency did not release all of the guidelines -- a matter we are continuing to explore with the agency.

The importance of the FOIA to supplement the reports of congressional committees can be illustrated by the information which has been released under the FOIA related to the CIA's use of academics. The Church Committee discussed current CIA practice only in the most elliptical manner while calling upon universities to establish guidelines to control what the committee described as a threat to the integrity of American universities. Our FOIA cases have pried loose some additional details about the program of secret relations with university professors to assist the CIA in recruiting foreign students. We believe that we are entitled to know much more about these programs and have two cases pending in the courts. But even what has been released so far has been of great value in alerting professors and universities to the issues and in enabling them to participate in the current debate about whether such use should be prohibited in the intelligence charter.

Finally, Mr. Chairman, we wish to underscore the essential role which judicial review plays in the process. It is not that courts will often or even perhaps ever order the Agency to release material. Rather it is that the knowledge that a judge may

examine material in camera leads the Agency, its attorneys, and the Justice Department attorneys, to take a hard look at the requested material and to decide if its withholding is really justified. In requiring such judicial review in 1974, Congress took a great step forward. The record since then amply demonstrates the importance of that change in the law and there is nothing in the record to show that it has harmed the national security.

As a result of the 1974 amendments, we believe that the CIA is a better institution and that it is more responsive to the dictates of the Constitution. In September 1977, Mr. John Blake, who was then the Deputy Director for Administration and was responsible for the implementation of the FOIA, told the Senate Subcommittee on Administrative Practice and Procedure that the Agency had made the necessary adjustments to make the Act work and that he thought the Agency was "better off for it." We share that judgment and stress that the public as well is better off for it. We do not believe that the case has been made for rejecting Mr. Blake's 1977 judgment, and therefore we urge you not to change this Act. The law should, in our view, be left as it is and the agency should be urged to more fully comply with its letter and its spirit.

We would now be happy to respond to any questions you may have.

Senator HATCH. Our last distinguished witness today is Ms. Ann Caracristi. Her service with the National Security Agency began in 1942 and since then she has progressed through the Agency to her current position. In April of 1980 she was appointed Deputy Director of NSA.

She has received a number of awards which include the Federal Women's Award, Exceptional Civilian Service Award, the National Civil Service League Award, and the Department of Defense Distinguished Civil Service Award. Most of her work with NSA has been as a cryptanalyst. Therefore, she has had firsthand experience with the Freedom of Information Act.

We are honored to have you before our subcommittee today. We will look forward to taking your testimony.

STATEMENT OF ANN CARACRISTI, DEPUTY DIRECTOR, NATIONAL SECURITY AGENCY, ACCOMPANIED BY JAMES HUDEC, LEGISLATIVE COUNSEL

Ms. CARACRISTI. Thank you, Mr. Chairman. I am certainly honored and pleased to be able to address this committee.

I would say that I have also had for approximately the past year the duty of serving as the agency FOIA appeal authority, so I have spent some time looking at the material that is requested and that which we are forced to deny, in the act of reviewing this material.

We have not had the same volume of requests that other agencies have had. We do receive over 400 requests per year and currently have about 13 FOIA cases in litigation. The cost to us is on the order of $500,000 per year and, again, we have costs in terms of the time of our professional people required to examine files and retrieve information.

In my opinion there are serious adverse consequences from the act that significantly endanger the signals intelligence and communications security activity of the United States. These two activities are often referred to under the single term, cryptologic activities. It is difficult to reconcile the legitimate purposes of FOIA which I personally and we as an agency certainly recognize—that is, to provide public access to Government records—with the mission of the National Security Agency which is to protect classified Government information from unauthorized access and to gather foreign intelligence using especially sensitive methods and techniques.

The NSA was established by Presidential directive in 1952 as a separately organized agency within the Department of Defense, and we are responsible through the Secretary of Defense for the conduct of the communications security and signals intelligence activity of the United States. We obtain intelligence data from a single, especially sensitive, and fragile source—foreign signals—and we provide devices and materials to protect U.S. communications against attempts by others to gain access to our U.S. communications.

Both signals intelligence and communications security use the same basic cryptologic methods and techniques. The Congress since as early as 1933 has provided special statutory protection for such cryptologic information methods and techniques, including protec-

tion for both unclassified and classified information and special requirements for access to this information.

The Freedom of Information Act since the 1974 amendment presents special risks of disclosure for cryptologic information and some special problems in protecting such information. Director Casey, I think, has covered most of the hazards which we would wish to address as well. We have been forced in the course of litigation to place far more information concerning our activities on the public record than we believe to be prudent or required. Even when we are required to file information with courts in camera, we are required then to expand access to those who would otherwise have no need to know, to information which is of special sensitivity and which has been so recognized by the Congress and, I believe, by the executive departments over many, many years.

One of the problems with the current act has been, in fact, that the courts have increasingly sought de novo review of records claimed to be exempt under the (b)(1) exemption solely because the records were classified. We have consistently seen the courts applying the review criteria of the (b)(1) exemption rather than adhering to those of the (b)(3) exemption, and this has required considerably more information to be produced and provided to the courts.

For that reason, we find even though we have had no direct losses in terms of our appeals to the circuit courts, that we are being forced continually to provide additional information into the record which puts to hazard the sources and methods of our operations. This information then becomes available to those whose motives are not in support of the security of the United States.

We do not believe the FOIA provides a useful or exclusive means of oversight over our activities. We are, as Director Casey has pointed out, regulated under the Foreign Intelligence Surveillance Act, under the Senate and House Intelligence Committees, under the Intelligence Oversight Board, and the Attorney General indeed also reviews our activities. We think these are more stringent and useful oversights than the Freedom of Information Act has been.

In summary, Mr. Chairman, despite the protections that we have and the relative success we have had in protecting sensitive cryptologic records from release, damage has been done. Relief from the Freedom of Information Act for cryptologic information is required in order to avoid further damage. Nothing short of total exemption from the act for the NSA is adequate to address the problem I have described, and we would like very much to work toward this end.

I would be very pleased to accept any questions you may have.

Senator HATCH. Thank you.

Much of your statement gave details about the administrative burden which an intelligence agency such as yours must shoulder in screening and processing Freedom of Information Act requests. In other FOIA hearings witnesses have recommended some procedural changes to relieve some of these administrative burdens.

Some of their suggestions included allowing the requester's attorney to participate in discussions with the agency to narrow the scope of his request, to allowing the requester's attorney to participate in an in camera viewing of some of the records to determine which would satisfy his client. What are your thoughts concerning some of these suggestions?

Ms. CARACRISTI. Well, narrowing the question is helpful but having the participation of the attorney in the narrowing is indeed putting to hazard the same thing as we discussed in the in camera presentation: We are widening the circle of access to sensitive classified information.

Senator HATCH. Therefore, you feel that that may not be the answer to the problems?

Ms. CARACRISTI. That is right.

Senator HATCH. I wonder if you could share with the subcommittee how much it does cost your agency to process Freedom of Information Act requests?

Ms. CARACRISTI. It costs about $500,000 a year and, as I say, the talents of experienced personnel including analytic personnel and of course the review of managers.

Senator HATCH. Of that amount, could you tell us how much is collected from the requesters who ultimately receive this particular information, and how do you decide when to waive fees in your agency?

Ms. CARACRISTI. The amount received has been somewhat on the order of $3,500, which is obviously considerably less than the cost. We do follow the spirit and intent of the act. We would waive costs if we felt that the information was of public value, that is, if it were unclassified information that could be released.

Again, I would stress that information requested under the Privacy Act of course is not of concern in our discussions about the Freedom of Information Act, and we would and do provide such information.

Senator HATCH. In your written statement you say, "In one appellate court, several uncleared clerks of the court were permitted to view top secret documents specifically marked for limited distribution." Which appellate court was that?

Ms. CARACRISTI. We can provide that.

Senator HATCH. Could you provide that?

Ms. CARACRISTI. We will put it on the record, sir.

Senator HATCH. Fine. I would like to have it here, if you know.

Mr. HUDEC. One of them was right here in D.C.

Ms. CARACRISTI. One of them was in the District of Columbia court.

Senator HATCH. I see. Which judge was it?

Mr. HUDEC. We would have to research that question, sir.

Senator HATCH. You would have to research that? OK.

[Material requested follows:]

The court in question was the U.S. Court of Appeals for the District of Columbia Circuit. The document that was submitted to a panel of the Court assigned to hear the particular case was reportedly made available to clerks assigned to the Court who were not cleared for access to the document.

Senator HATCH. In still another case, you say, "a top secret document so marked, having served its purpose, was stored in the office safe of an uncleared Department of Justice attorney." I guess these are just a couple of illustrations of how these documents can be misused and mishandled.

Ms. CARACRISTI. That is right. I think again we would like to emphasize the point that Director Casey made, that the problem is in-

advertent disclosure. I think the basic rules for security are that you minimize access to classified information. We are not.

Senator HATCH. On the release of classified information to clerks of a judge, I had one of the top Federal district judges in the country, trial judges, just absolutely amazed that materials are given to clerks that have not been cleared for security purposes, just absolutely amazed that this is done all the time. Aren't you a little amazed at that or is that just so common that you are used to it?

Ms. CARACRISTI. We are amazed and very concerned about that, and it is the basis of our recommendation that the National Security Agency be exempt from this judicial review.

Mr. HUDEC. I might add there that one of the problems is that a suit may be brought anywhere in the United States, and in such a case what you normally encounter is a judge and clerks who have not encountered the kind of information that we produce at any time in the past.

Senator HATCH. They may not even realize the significance of it.

Mr. HUDEC. That is right. Even though we try to educate them in terms of what protections are required, obviously if they have not had the experience and they do not have the constant reminders that our own employees receive, that just tends to lead to additional difficulties.

Senator HATCH. However, I would think that a District of Columbia circuit judge might be a little more astute on matters like that.

Ms. CARACRISTI. That is certainly true.

Senator HATCH. Although this may be sensitive, could you give the committee some vague notion about how many or the nature of past instances of the Freedom of Information Act causing disclosure of vital information, or at least information your agency deems to be vital?

Ms. CARACRISTI. I am not sure I can, Senator.

Mr. HUDEC. I think the primary problem is that it is difficult to talk about it in open session but we would be happy to talk about it in closed session or respond if the question is provided in a written form in a classified way.

Senator HATCH. I understand.

Mr. HUDEC. However, we have had more than one occasion when another agency holding our documents, or documents based on our information, has attempted to sanitize or simply has released those documents without first consulting with us as to what needed to be protected. I think that is one of the major damages that we have suffered in terms of the inadvertent mistakes that tend to accompany the Freedom of Information Act processes.

Senator HATCH. When you refer to the complete exemption from the Freedom of Information Act for the National Security Agency, do you mean to include requests by individuals seeking personal information about themselves?

Ms. CARACRISTI. No, we do not, sir, unless that information is classified which it would not normally be.

Senator HATCH. Could you review for the subcommittee how the National Security Agency might be affected differently under the Freedom of Information Act and its related problems than the CIA?

Ms. CARACRISTI. I think the main difference is that the kind of information that we are responsible to provide, the intelligence information, is from a single source. Therefore, the fact of possession of information becomes revealing and the precision of the requirement to provide such information is putting to hazard our sources and methods. The CIA deals with a wide variety of sources, a wide variety of information, and is therefore better able I think to protect some of its information.

Senator HATCH. I understand that your speciality at the Agency has been cryptology.

Ms. CARACRISTI. Yes, sir.

Senator HATCH. Could you tell us any instances in your personal experience where the Freedom of Information Act has caused problems in your personal field?

Ms. CARACRISTI. We have, as I have said, been successful in protecting that information under regulations which allow us not to provide except in court situations. Were the courts to rule against us, this would indeed be a serious problem. At the moment I would say that the largest problem is the diversion of some resources that could otherwise be producing information in support of national requirements, to follow through, segregate, sanitize information requested under the Freedom of Information Act.

Senator HATCH. Thank you so much. These hearings have been very helpful today and we hope that somehow or other we can arrive at some effective solutions to some of the problems that you, the CIA, and other agencies of Government have.

Ms. CARACRISTI. Thank you, Mr. Chairman.

[The prepared statement of Ms. Caracristi follows:]

Prepared Statement of Ann Caracristi

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to address the Senate Judiciary Subcommittee on the Constitution concerning the impact of the Freedom of Information Act (FOIA) on the National Security Agency. Although NSA has not been required to devote the same resources to FOIA processing that are required by the volume of requests received at FBI and CIA, there are, in my opinion, serious adverse consequences from the FOIA that significantly endanger the signals intelligence and communications security activities of the United States. These two activities are often referred to under the single term, cryptologic activities. It is difficult to reconcile the legitimate purpose of the FOIA, that is, to provide the public access to Government records, with the missions of NSA, which are to protect classified Government information from unauthorized access and to gather foreign intelligence using especially sensitive methods and techniques. I would like to provide you with some background on NSA and to discuss some aspects of the FOIA process which endanger the classified cryptologic activities of the United States Government.

NSA was established by Presidential Directive in 1952 as a separately organized Agency within the Department of Defense under the direction, authority and control of the Secretary of Defense, who was designated by the President as Executive Agent of the Government for the conduct of the communications security and signals intelligence activities of the United States.

NSA has two missions -- the acquisition of foreign intelligence information through exploitation of foreign electromagnetic signals, signals intelligence, and the protection of the communications of the United States, communications security. The unique sensitivity of both of these missions has long been recognized by Congress as reflected in various statutes. The Congress acted as early as 1933 to protect cryptologic information by passing section 952 of title 18, U.S.C., to provide penalties for the unauthorized disclosure of information concerning U.S. codes or prepared in code

or foreign information acquired by the U.S. Subsequently, the National Security Agency Act of 1959 provided, in part, that no law "... shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." Section 798 of Title 18, U.S. Code, further recognizes the extreme sensitivity of cryptographic information by setting out special criminal penalties for the unauthorized disclosure thereof. These special protections afforded by Congress are entirely appropriate because virtually the entire range of information generated by NSA is necessarily classified in the public interest. Whether specific NSA information relates to signals intelligence or communications security, its inherent fragility requires that it be protected, and potential disclosures pursuant to the FOIA pose a significant danger to the national security.

Disclosures of information concerning U.S. communications security procedures could render U.S. Government communications vulnerable to foreign exploitation. Most classified or national security related information of the United States, whether military, diplomatic or economic, must at some time be exchanged between U.S. authorities who are physically separated. To ensure the safeguarding of such information, it is U.S. policy to transmit classified information by secure communications. We know that foreign intelligence officials go to great lengths to discover U.S. communications security protections in order to gain knowledge of the underlying information. Indeed, we know that large sums of money have been offered by foreign powers for delivery of COMSEC equipment or materials. Examples recently reported in the media reflect the efforts made by the Soviet Union to obtain such materials.

Signals intelligence is the opposite side of the coin. It is the exploitation of foreign electromagnetic signals. By this medium the United States gathers significant information not available by any other means. It would not be prudent for me to discuss the

value of signals intelligence in this public forum, but that value is known to the Congress. What is important to consider, for today's purposes, is the susceptibility to unauthorized disclosure of both signals intelligence and communications security. A single inappropriate disclosure could expose our capabilities, identify targeted channels of communications, reveal policy-level intelligence tasking, make vulnerable U.S. communications or cause severe harm to U.S. foreign relations.

In light of this extreme susceptibility to unauthorized disclosure, the risk under the FOIA to U.S. Government efforts becomes apparent. The mission of NSA is such that nearly all intelligence information possessed and responsive to an FOIA request would have been derived from a foreign communication and must therefore be withheld from disclosure. To respond with the information requested could obviously reveal sensitive information about the Agency's abilities and interests, including such specifics as, for example, the communications channel intercepted or the foreign source targeted for intelligence exploitation. In some cases, even to admit the possession at NSA of requested documents could reveal sensitive information, especially when a particular communication, or information passed over specified channels, is requested. Moreover, there is no way of assuring it is just the requester who would gain this knowledge. Obviously those who sent or received the requested communications, any intermediaries and any other power who intercepted it would know of the communication(s) and could determine NSA's ability to intercept that communication. If the message was encoded, the ability to exploit the code would be revealed. It would even be possible to learn information about NSA's technical ability to acquire, process and report such information. Of special concern is the danger of revealing policy-level intelligence tasking, especially if certain subject matter possessed by NSA can be associated with a specific, targeted communications channel.

An inappropriate or inadvertent disclosure which would reveal these intelligence secrets can have unfortunate and immediate

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consequences. Foreign targets may avoid using certain communications channels; they may upgrade codes or other methods of securing their transmissions from exploitation; they may view the disclosure as an opportunity to construct and transmit misleading information; they may be assisted in finding ways to optimize their own signals intelligence research and development efforts.

In light of the enormously fragile but important nature of NSA's information, any risk of compromise is, in my view, unacceptable. Experience shows that this risk is very real.

Fortunately, NSA has not yet "lost" a case at the appeals court level so as to be required to disclose documents it sought to protect pursuant to FOIA disclosure. However, in the course of defending Agency withholdings under appropriate exemptions, NSA has been forced to construct increasingly longer and more detailed affidavits -- both open and in camera -- to justify the Agency position. The depth of detail contained in these affidavits is of concern. Not only are we required to discuss the information immediately involved, and to admit on the open record the possession of certain information deriving from signals intelligence, but in order to illustrate its significance, we have been required to reveal in the in camera affidavit information about policy-level tasking, targeted communications channels and sensitive technology. The documents required to defend withholding under FOIA therefore become even more sensitive than the requested information itself because of the need to place it in context and explain its significance. At the same time, the cumulative effect of the open record admissions increasingly reveals NSA activities. This problem is exacerbated by courts which seem to believe that each succeeding case requires that more about NSA be disclosed than has been previously placed on the open record. This has led some courts to refuse even to consider in camera evidence until more is stated on the open record. Sworn statements attesting that further public record disclosures would reveal classified information have been of little avail.

Our concern about the increasing sensitivity and detail of the classified affidavits has been heightened by the risk we have faced many times that they will be revealed in whole or in part. For example, one district court's order to disclose all but two paragraphs of one such affidavit was prevented only by prompt filing of a motion to reconsider in light of a recent appellate court decision.

Other problems have also developed in the course of FOIA litigation. The 1974 Amendments to the FOIA, which permitted de novo review of the classification of information, were passed, in part, on the understanding that the sworn statements of Agency officials would be given great weight in these considerations. Yet, some courts have been reluctant to believe these Agency affidavits despite the clear, contrary Congressional intent. Certain courts have openly and pointedly factored this distrust into their written decisions. One court, for example, refused to give substantial weight to an NSA affiant -- an Agency official expert in the activities of the Agency and the consequences of releasing Agency documents -- because he had not personally read each of the 500,000 pages being withheld.

Similarly, the Congressional provision for in camera proceedings is apparently viewed with great disfavor by some courts. One court refused to receive or read an in camera affidavit and awarded summary judgment to the plaintiff because the government's proof was not, therefore, in evidence. Courts which perceive a dilemma in these ex parte, in camera procedures have given serious consideration to "solving it" by permitting plaintiffs or their attorneys to participate in a "classified" hearing to consider the Agency's in camera submission.

Part of our difficulty under the FOIA has been caused by what I believe to be a clear departure by the courts from the original intent of the Congress concerning the 1974 amendments to the FOIA. Congress clearly intended to subject certain categories of classified information to stricter review by the Courts through

the (b)(1) exemption covering information classified pursuant to executive order. However, the Congress also clearly intended that certain limited categories of classified information already protected by statute be provided a higher threshold of protection under the (b)(3) exemption, which exempts information protected by statute. This information was not intended to be subjected to the same kind of de novo analysis expected when information is protected only under the (b)(1) exemption because Congress had made the threshold decision that information falling within the protection of a specific statute must be provided a higher degree of protection under the (b)(3) exemption.

Among the statutes listed by the Congress in the Conference Report on the 1974 Amendments as qualifying as a (b)(3) exemption statute, was section 798 of title 18, U.S.C., the statute protecting classified cryptologic information. The Conference Report stated that:

> "...communication[s] information (18 U.S.C. 798) ... for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law."

In a number of cases, however, courts have not deemed it sufficient to identify the information as coming within the categories specified by section 798, and currently and properly classified. Further, such courts have elected to go beyond the affidavit, to examine the records themselves, to require detailed individual justifications for each record and to subject even section 798 material to a de novo review, normally expected only for the (b)(1) exemption, thus negating Congressional intent with respect to the (b)(3) exemption. In fact, since the 1974 amendments, only two courts have ruled on the application of section 798 because a (b)(1) analysis, thought to be required for any classified informa-

tion was viewed by the courts as rendering unnecessary a (b)(3) analysis. This process is the reverse of what the Congress had originally intended. In addition, both of the courts that held section 798 applicable as the (b)(3) exemption, went on to also apply the (b)(1) exemption.

The problems we have encountered in litigation of FOIA cases are great, but there are many more dangers inherent in the more routine administering of FOIA requests. These dangers begin when a request for information is received. As I have previously mentioned, because of the unique and limited role of NSA, nearly all information produced by NSA is classified. Both Congress and the Executive have long restricted access to classified information to those persons whose responsibilities included operational use of or need for that information. That historic safeguard of classified information is lost under the FOIA. The administrative process requires that many who would not ordinarily receive it be given access to the information responsive to a request. This begins with technicians who retrieve the materials, and proceeds through various administrative elements, the FOIA unit and, finally, Agency attorneys. Few, if any of these individuals will have prior knowledge of the subject matter sufficient to instill an immediate appreciation of the importance of its many facets; often, they would not see the information under normal "need to know" criteria. This defect becomes even more acute when the process originates at another agency where the information is retrieved and handled by persons without any real knowledge of the sensitivity of signals intelligence or communications security information. All too often we have found that persons at other agencies handling NSA material in this referral process are not appropriately cleared. In some cases other agencies have released classified information either because they did not recognize it as NSA information or because, out of naivete or ignorance, they have ineffectively attempted to sanitize and release it themselves.

It is clear that the potential for compromise rises with increased exposure. I am therefore extremely concerned with the ripple effect generated by the FOIA within the intelligence agencies,

even though those personnel are usually cleared for at least some level of classified data and receive constant security reminders. I am even more concerned, however, over the increased exposure required when an FOIA requester institutes litigation. This requires that additional personnel be given access to the information. In addition, since we can rarely defend an FOIA withholding exclusively on the public record, NSA usually must prepare a detailed in camera affidavit which is often more sensitive than the actual information withheld. It contains, as the court demands, the rationale for withholding information, and this usually includes an explanation of the sources and technical methods involved.

Cases which arise in courts remote from the Washington, D.C. area pose additional problems concerning the storage of classified affidavits. Only a few U.S. courthouses are equipped to store highly classified NSA information, yet courts often require ready access to the affidavits. Moreover, federal judges frequently have little experience in protecting such information.

In various types of litigation we have discovered, for example, that because of the Court's requirement for continuing access, Top Secret affidavits specifically marked for limited distribution were stored in insecure areas and held by individuals without either a clearance or a need to know. In one of these, the Court's uncleared clerk was given access to the affidavit despite the fact that the District Judge had been advised that this should not be permitted. In one appellate court, several uncleared clerks of the court were permitted to view Top Secret documents specifically marked for limited distribution. In still another case a Top Secret document so marked, having served its purpose, was stored in the office safe of an uncleared Department of Justice attorney.

We have raised these general concerns over classified handling procedures with other agencies. In some cases steps have been taken to ensure that current procedures are modified to prevent administrative, though not necessarily judicial, mishandling of this type. I am not convinced, however, that even significantly increased care

can completely eliminate the kind of mistakes that have occurred, resulting from the proliferation and widespread dissemination of sensitive information required by compliance with the FOIA. In my view, the risks of compromise are so great that the United States should not have to subject sensitive cryptologic information to the risk of the inadvertent but unfortunate human errors that FOIA processing and litigation have fostered.

Mr. Chairman, Members of the Committee, in summary, the extremely sensitive NSA functions and activities have been made vulnerable by the FOIA in all stages of its administration. The special protections for cryptologic information provided by the Congress have been rendered less effective. It is further illustrative to note that the original purpose of the Act -- to make public the processes of government -- really has little, if any, application to NSA where the only assigned missions are classified in the public interest and information concerning them must normally be denied the FOIA requester.

Although supporters of the Freedom of Information Act allege that it provides for constant oversight of intelligence activities, including the classification and declassification of information, this is not true at least with respect to cryptologic information. Stringent long term protection is required for cryptologic information and has been provided for by both the Congress and the Executive. NSA is subject to numerous effective forms of oversight. Department of Defense Directives provide for an Information Security Policy Officer to govern Agency classification programs. These programs are audited on a periodic basis by the Information Security Oversight Office and aperiodically by the General Accounting Office. Executive Order 12065 provides for mandatory classification reviews and access by historical researchers. Executive Order 12036 provides for an Intelligence Oversight Board and Inspector General and General Counsel supervision and reporting requirements, and the Attorney General is directly involved in reviewing questions of legality or propriety. Additionally, the Privacy Act provides individuals with

substantial safeguards and access to Agency records indexed or filed under their name or other individual identifier. Further, the Foreign Intelligence Surveillance Act of 1978, in which the Judiciary Committee played a significant role, and executive order procedures provide strong protections for U.S. citizens and preclude the production of information concerning them except pursuant to court order or Attorney General approval. Finally, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence provide far more effective mechanisms for thorough oversight of intelligence activities than the Freedom of Information Act, without the risk that classified information will be compromised.

Mr. Chairman, despite the protections that we have and the relative success we have had in protecting sensitive cryptologic records from release, damage has been done. Relief from the Freedom of Information Act for cryptologic information is required in order to avoid further damage. Nothing short of a total exemption from the Act for the NSA is adequate to address the problems described herein. I hope we can work together to fashion that relief. I appreciate this opportunity to testify today and I would be pleased to receive any questions you might have.

Senator HATCH. With that, we will recess these hearings until further notice.

[Whereupon, at 11 a.m., the committee recessed, to reconvene at the call of the Chair.]

FREEDOM OF INFORMATION ACT

THURSDAY, OCTOBER 15, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:45 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Hatch.

Staff present: Randall Rader, counsel; and Claire Greif, staff.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. This is the fifth day of hearings before the Subcommittee on the Constitution on the subject of reforming the Freedom of Information Act.

During the previous four hearings we have taken testimony from 25 witnesses from nearly every conceivable viewpoint. Each of these witnesses has contributed significantly to this committee's understanding of the legal and practical concerns with the Freedom of Information Act. Today we anticipate enhancing the excellent record we have accumulated up to this point.

The efforts of these many witnesses are swiftly coming to fruition. Already these statements have greatly informed my work in drafting the bill which will serve as the vehicle for further deliberations in the subcommittee, S. 1730.

Perhaps I could briefly outline the content of S. 1730 as a preface to our proceedings today. In our previous hearings, we heard extensive testimony on the cost of FOIA.

For instance, Assistant Attorney General John Rose informed us that the FBI alone incurred costs of over $11 million last year to comply with the act. The cost for this single Agency was 110 times greater than the Congress's forecast in 1974 that FOIA would cost $40,000 to $50,000 and maybe as much as $100,000 Government-wide. Congress clearly did not contemplate the extent of FOIA's costs. Moreover, a 1978 Justice study found that less than 2 percent of the costs of the act were collected in user fees.

At a time of budgetary constraints therefore, it only makes sense to require the Office of Management and Budget to draft a uniform set of regulations governing FOIA fee collection. The incentive for agencies to comply with the fee collection regulations will be a provision allowing the agencies to use one-half of the collections to offset the costs of complying with the act.

Time limits was the next problem area in the existing act. When Government agencies rush to comply with the current inflexible 10-day time limits, there is a tendency for them to withhold information on legal grounds that a more deliberate analysis might have allowed them to disclose. Such hasty processing also increases the chance that the agency might disclose trade secrets or the identity of confidential law enforcement sources. Accordingly, both requesters and Government agencies have an interest in more flexible time standards.

S. 1730 is sensitive however to the witnesses from the journalistic community who persuasively contended that any further extension of time limits would prejudice their interest in timely information. Therefore the bill does not change the 10-day limit but instead builds more flexibility into the act to allow an agency an extra time cushion in difficult or unusual circumstances.

The next area of concern deals with duplicative requests. This section of the bill treats two problems. The first problem is that agencies are often burdened by requests for information that is publicly available in newspaper accounts or court records.

The bill would allow the agency to refer the requester to those public records without putting him or the agency to the expense of duplicating such records.

The second problem is that agencies are often bombarded with frequent requests for the same information from the same requester or the same requester might make an identical request to a multitude of agencies.

S. 1730 will allow the agency, in the first instance, to simply update information it has already sent to the requester. In the second instance, it allows the multitude of agencies to coordinate their efforts and send the single requester a single response. This will eliminate the extra cost to the requester of paying for several copies of the same information from different agencies.

The current act contains a provision stating that any portions "reasonably segregable" from a requested record subject to some exemptions should be disclosed to the requester. The meaning of this provision has caused many lawsuits. S. 1730 will set some standards for deciding what is "reasonably segregable" and what is a totally nonsensical and useless record after the exempted material is excised.

Exemption 2 covers internal personnel rules and practices of an agency. Although the House report on the 1966 act clearly stated that law enforcement manuals and procedures should be exempt under this section, some courts have ruled that law enforcement manuals could be disclosed, such as in the case of *Lesar* v. *Department of Justice* (636, F. 2d 472). S. 1730 would explicitly restore the understanding reached in 1966.

Business confidentiality has been a major concern under FOIA. Several witnesses have clearly shown that confidential business information may not be safe in Government files under court interpretations of FOIA.

Although the Senate report on the 1966 bill stipulated that any information "customarily not released to the public by the business" would be exempt under exemption 4, courts have subsequently required businesses to show a "substantial competitive harm" in

order to block disclosure of their own confidential information. This leaves a judge to make a very subjective judgment about the potential economic harm of a disclosure.

The revised standard of S. 1730 clarifies that where disclosure would "impair legitimate private, competitive, financial, research, or business interests" the information will be withheld.

Finally, the procedural changes of S. 1730 grant a submitter of information notice that his records may be released, a chance to be heard against the release, and de novo court review where the information is scheduled to be released despite his objections.

Individual privacy was the object of the sixth exemption in the 1966 act. Courts have recently interpreted the language "personnel and medical files and similar files constituting a clearly unwarranted invasion of personal privacy" to mean that only personal information in files similar to medical files will be exempt. This narrows the protection of exemption 6. Congress clearly intended to protect individual privacy as the central principle of this exemption. The revised version would make that important change.

Finally, law enforcement officials have experienced difficulty in performing many of their functions under FOIA. Not only have informants been reluctant to cooperate for fear—either real or perceived—that their identity may not be secure, but State and local enforcement officials have been hesitant to share information as well.

This revision of the seventh exemption will make clear that anything which "tends to" disclose an informant or is confidentially shared by a State law enforcement body will be exempt.

S. 1730 also exempts information which might endanger any natural person, instead of just law enforcement officers as the exemption now reads. My bill will also allow regulations to be promulgated to restrict the access of imprisoned felons to information under FOIA.

While this bill will provide a convenient tool for future subcommittee consideration, we certainly intend to be well informed and directed by the administration's bill which the Justice Department will present today.

The efforts of past and present witnesses, past and present administrations, and past and present committees are finally bearing fruit. The Freedom of Information Act and the citizens it serves should be better for these efforts, or at least we hope that is the case.

We are pleased to welcome as our first witness Mr. Jonathan C. Rose, Assistant Attorney General in charge of the Office of Legal Policy.

Mr. Rose testified on the opening day of our hearings on the Freedom of Information Act, July 15, and promised at that time to return with the administration's recommendations for Freedom of Information Act amendments. We are anxious to receive that input today.

Mr. Rose came to the Department of Justice from private practice as a partner in the firm of Jones, Day, Reavis & Pogue. Prior to his private practice he served as Associate Deputy Attorney General and Deputy Assistant Attorney General for Antitrust.

Mr. Rose, we are happy to have you with us today, and we look forward to hearing your testimony.

STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. ROSE. Thank you very much, Mr. Chairman.

I would like to apologize at the outset that our production problems did not permit us to have adequate copies up here for the press today but only copies for the committee of our proposal. It will be available at the Public Information Office at the Department of Justice later on this morning.

Mr. Chairman, I am pleased to appear before the committee today to present the administration's proposed amendments to the Freedom of Information Act.

The proposal is a part of the Department of Justice's legislative program for the 97th Congress. The Office of Management and Budget has advised me that this legislation is in accord with the legislative program of the President. We urge the Congress to give this legislation its prompt and favorable consideration.

This administration is firmly committed to the faithful implementation of the Freedom of Information Act by all Federal agencies. The letter and the spirit of the act require agencies to respond promptly and fully to requests for information by the general public, except where this would interfere with other important public interests, which the several exemptions to the act seek to protect. We are fully committed to carrying out the philosophy and spirit of the act in full.

We are however concerned that in some instances the Freedom of Information Act has been used in ways that are inconsistent with the original objectives of the Congress.

Certain requirements of the act have interfered unduly with proper law enforcement activities and national security functions of the Government. In addition, compliance with some provisions of the act has resulted in unnecessary burden and great expense to the Government without any corresponding benefit to the general public.

Our review of the act was prompted not only by the complaints of Federal agencies but also by the increasing concerns regarding the burdens imposed by the act that have been expressed by the courts.

A very recent example concerns the requests for intelligence files made by Mr. Philip Agee, a private citizen who has announced a campaign to expose the Central Intelligence Agency officers wherever they are operating. Responding to Mr. Agee's requests has cost the American public nearly $500,000.

A respected Federal district court judge here in Washington who heard the suit which arose over the requests stated that: "[i]t is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." (*Agee* v. *Central Intelligence Agency,* 517 F. Supp. 1335, 1341-42 (D.D.C. 1918).).

Another recent opinion by the United States Court of Appeals for the Third Circuit stated:

What concerns us particularly is that a law enforcement agency, the FBI, is being required to expend sorely needed resources, not to deal with the burgeoning problems of crime which seriously besets all our citizens, but to devote a large number of hours of exacting labor sorting out affidavits that were collected to apprehend crimes and prosecute offenders. Moreover, informants, once aware that copies of affidavits submitted to law enforcement agencies can be made public, might be inhibited from future cooperation.

A further concern is that the use of the FOIA, in the fashion employed here, will impose an additional burden on the trial courts that are already overworked. It will make it necessary for them to review large numbers of records, such as had been requested here, in—camera. And the fact that this procedure will be placed in an adversarial context will further prolong the process and add to its vexatious nature.

Perhaps when Congress is made aware of the problems spawned by the use of the act which we have identified here and on which Judge Adams has commented in a slightly different context in *Ferri*—v.—*Bell*, 645 F. 2d 1213, 1226 n.17 (3d Cir. 1981), it will attempt to accommodate the concerns which we have expressed. (*Lame* v. *United States Department of Justice*, 654 F. 2d 917, 929 (1981)).

To remedy these and other shortcomings in the current act, the administration offers a series of amendments to the Freedom of Information Act to improve existing procedures for the disclosure of information and to give broader protection to certain types of information.

At this point I should like to place in the record some of the history leading up to these proposed amendments. In 1979, following testimony before the 95th Congress concerning problems resulting from the 1974 amendments to the act, the Department of Justice prepared a series of amendments to the act. Those proposed amendments became known as the Civiletti proposals, named after former Attorney General Benjamin Civiletti.

When this administration took office, the Department began a review of those proposals and made an independent study of the problems being experienced with the existing act.

In addition, we reviewed all the testimony on the operation of the Freedom of Information Act which has been given before various committees of this Congress, particularly this committee, as well as the prior two Congresses.

It is sufficient to say that we believe that the issues raised have been fully aired and debated over the past 6 years and that Congress should now take appropriate action to improve the Freedom of Information Act.

The proposals that we are presenting today address almost all of the important problems that have been raised in the past by the Congress and by Attorney General Civiletti on behalf of the prior administration. These proposals are, in many respects, more modest in their approach than those drafted by the prior administration. They present, in the view of this administration, a fair compromise of the points of view which have been expressed by the interested parties and should, we believe, receive bipartisan support.

Although the details of the proposed amendments are set forth fully in the section-by-section analysis which I would like to submit for the record, I would like to outline briefly the major elements of the administration's package.

First, the proposed amendments would clarify several of the act's exemptions and procedures to strengthen the protection given to information where disclosure would result in an unwarranted invasion of personal privacy, harm the public interest in law enforce-

ment, injure the legitimate commercial interests of private parties who have submitted proprietary information to the Government, or impede the effective collection of intelligence.

Second, the proposed amendments would preclude the use of the Freedom of Information Act as a means to circumvent discovery rules by parties in litigation.

Third, the proposed amendments would provide for expedited processing of requests from the media and others seeking information for broad public dissemination while concurrently establishing realistic time requirements for agencies to respond to requests and decide appeals.

Fourth, the proposed amendments would establish procedures enabling submitters of confidential commercial or financial information to object to the Government's release of such information.

Fifth, the proposed amendments would permit the Government to charge requesters fees that more closely reflect the actual costs of the Government's search and review of documents.

Finally, the proposed amendments would add two new exemptions from the act for records generated in legal settlements and records containing technical information the export of which is controlled by law.

The administration believes that these amendments meet the goal it set for itself when it undertook this review—that is, to remedy the problems with FOIA that have been identified by recent analyses while preserving the act as a useful tool to keep the American public as informed as possible about the operations of its Government. We believe our proposals will achieve an appropriate balance between these two objectives.

We are most grateful to this subcommittee and to its sister subcommittee on the House side for devoting so much time to this important subject. Accordingly, we look forward to working with Congress to achieve the prompt passage of this legislation.

Senator HATCH. Thank you, Mr. Rose.

I want to commend you at the outset for the excellent presentation you have made today and your willingness, and the Justice Department's willingness, throughout the process to cooperate with this subcommittee.

When you appeared before the subcommittee last July, we briefly discussed the Civiletti proposal for FOIA changes, and that proposal was made a part of the hearing record at that time.

How does the current administration proposal differ and, I might add, how does it agree with the Civiletti approach; and can your legislation be legitimately termed a "product of several administrations"?

Mr. ROSE. Taking the last part of your question first, Mr. Chairman, I think indeed this legislation can be termed a "product of the work of several administrations." In a number of areas we have either adopted the Civiletti proposals or we have taken a different drafting approach but tried to achieve the substance of what the past administration had recommended.

I think the principal difference—perhaps two principal differences—in this bill from the one that Mr. Civiletti had drafted are: First, this proposal contains no across-the-board moratorium for law enforcement criminal files.

While we believe that that might well be in some respects a more certain way of achieving the objective that we are seeking to achieve by our proposal, we have attempted here to balance the need to strengthen the protection provided in the law, particularly for information coming from confidential informants and other critical law enforcement information contained in the most sensitive of FBI files, against the legitimate need of the public to have access to those files of the FBI to which it can have access without doing damage to law enforcement. Our approach therefore does not include the across-the-board moratorium.

We also do not address in this bill, as the Civiletti bill did, the files of the Central Intelligence Agency. In a number of the other areas however, relating to fees and the business exemption and so on, we have adopted much of the Civiletti proposals.

Senator HATCH. I can anticipate that the major hurdle that this committee will have to face with regard to this legislation is the notion that the act needs no revision at all. This administration, and previous ones as well, seems to disagree with that notion, because they have developed detailed proposals, as you have articulated here today, to change the law.

What do you think would be the consequences of not changing the law as you have proposed here today, and what legal and practical difficulties can you see down the road if no action is taken to revise the Freedom of Information Act?

Mr. ROSE. Very frankly, Senator, I have been somewhat amazed because the rhetoric on this issue is perhaps as heated as one ever encounters in public debate. Indeed, often the rhetoric on this subject is phrased in terms usually reserved for the first amendment.

It is clear to me that this act is not an unmixed blessing. It is quite often said that neither this administration nor the last one has come forward with any evidence as to problems that the act has caused. That simply seems to me to be a situation of people simply not having ears to hear nor eyes to see.

I think Director Webster has testified repeatedly on several occasions as to the very serious impact on law enforcement information that this act has had in terms of drying up the willingness both of State and local police organizations and foreign police organizations to cooperate with the FBI, also creating in the minds of a number of traditional FBI informants serious doubt as to whether the FBI is capable of keeping the information that is furnished by informants secret.

There is a saying in the law that hard cases make bad law, and I think in 1974 when the amendments to the act were adopted, they were adopted in an atmosphere of rather extraordinary post-Vietnam and post-Watergate concerns and environment.

What we have asked, and what the prior administration was prepared to ask, is that the act be revisited in a somewhat more balanced environment so that we can take another look at it and address the problems that have arisen in the 7 years since the act was passed.

In the area of business information that you have mentioned, the business community, in our judgment, has made a very substantial case. Indeed, I think this is one of the ironies of the act. I do not

think the Congress conceivably anticipated when the act was first passed the kind of extensive commercial use that would be made of the act by business competitors. Businesses of all types submit information to the Government in order to get licenses, in order to do business with the Government when it is procuring products and also when the Government is investigating certain kinds of violations.

Given the fact that there have been, I believe, some 1,300 decisions interpreting this act and a major number of them interpreting the business information exemption under the act, the fact that there is significant confusion as to what precisely is covered by the exemption and the rights of submitters of business information to protect that information from their competitors, I think, makes a very compelling case that this act simply has to be revisited. Also, the status of business information and the status of submitters of that information to be able on an expedited basis to make sure that the information they give to the Government is adequately protected must simply be addressed. People who refuse to look at these problems, I think, are simply refusing to face up to reality.

Senator HATCH. Perhaps I could ask just one more broad policy question before we get into specifics. I have been particularly interested in some of the excellent presentations made by representatives of the media and press in earlier hearings.

As you well know, a vital and informed press is essential to a democracy, which depends on the education of its voters. How will your proposals affect the press? What provisions would you anticipate would cause them the most difficulty in gaining access to important public policy information? And what efforts have you made to see that government remains open after your recommendations are adopted, if they are adopted at all?

Mr. ROSE. Senator, we certainly share your view that a free and informed press is vital to the preservation of our democracy.

We have attempted to review the studies that have been done, particularly one done by the Congressional Research Service most recently on the use of the act by the press from 1972 to 1980. I believe in that study there were some nine stories in all of 1980 that were attributed by that study to the Freedom of Information Act. This is one of the problems in dealing with this subject.

Our proposal, we believe, is a very modified and limited one to not attempt to affect access by the press to records to which they should have access but to attempt to affect the ability of particularly those engaged in organized crime, terrorism, and foreign intelligence efforts here to have access to very sensitive FBI files.

Frankly, I do not believe, from my review of the stories that have been written by the press, that our proposals would affect the ability of the press to have access to the files which they have had access to before.

For example, there has been, I think, some misimpression that the Freedom of Information Act has been the major source of exposure of things such as Watergate or various problems with the Central Intelligence Agency or the FBI.

The truth of the matter is that most of the revelations in these various areas that took place in the last decade came about as a result of a number of things: one, internal investigations that were

undertaken by those agencies; two, release of materials that were developed through investigations up here on the Hill. With regard to the CIA, we have Vice President Rockefeller's commission, which published a report on the problems with the Central Intelligence Agency; and we have also had, in the case of requests made to the Justice Department, substantial declassification of materials, none of which could be compelled either under our proposal or under the act as it exists today by a Freedom of Information Act request.

Exemption (b)(1) very clearly indicates that if material is properly classified it simply is not releasable under the Freedom of Information Act. In a number of cases the Attorney General simply decided that it was in the public interest to declassify this material and release it to the press.

The Freedom of Information Act, I think mistakenly, has become a highly overrated instrument on the part of some as being the source of these disclosures when it simply was not.

Senator HATCH. We heard testimony on July 15 from the Association of American Medical Colleges that noncommercial research often conducted with a Government grant needs to be protected by a fourth exemption.

Your fourth exemption language, I notice, would expand (b)(4) to include financial and business interests but not necessarily—well, it does not mention research interests. Would it not be best to clarify the text of (b)(4) to cover this interest as we have tried to do in S. 1730?

Mr. ROSE. Senator, we believe that, as we have redrafted (b)(4), adapting it to information submitted by any person, that would cover nonprofit organizations such as the one that you have described and also that financial information would cover the research material that you have reference to. We certainly would have no objection to additional clarification, sir.

Senator HATCH. Your provision for restricting the use of FOIA in place of traditional court discovery processes—I think that is subsection (a)(3)(b)—is commendable. It does raise a few questions, however, because if your provision covers administrative proceedings that have not yet gotten to court, then parties to administrative proceedings would be required to use agency discovery rules to make requests of the agency. This concerns me because many agencies have inadequate discovery rules. Is that correct?

Mr. ROSE. We have tried to do the best we could in that area. Obviously, we recognize that perfection is not entirely achievable. What we have tried to do is require that a certification be made by the requester that he is not operating either himself or on behalf of another who is involved in litigation or an administrative proceeding.

That was as far as we felt we could go without destroying the utility of the act to people who have a perfectly legitimate interest and who may not be directly involved in the administrative proceeding.

Senator HATCH. Would it be better to confine your proposal on the use of FOIA as a discovery tool to the rule that information would be obtainable by normal rules of discovery in the Federal

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courts? Would it be best to eliminate this provision with regard to administrative proceedings that are not yet in the courts?

Mr. ROSE. Essentially this is a question of balancing, Senator. We thought that once someone is involved in an active adversary proceeding with the Government the person should be remitted to the traditional rules of discovery which carry within them requirements of relevance and that the request not be burdensome or oppressive—that that seems fair once an administrative or a court proceeding has taken place.

What we have found has happened quite often is that people have rather designedly, once they have gotten involved in either an administrative or court proceeding, simply swamped the Government attorneys on the opposite side of the case with Freedom of Information Act requests, in response to which the Government attorneys have to produce the records in response and simply have themselves preoccupied with that kind of activity rather than litigating the major proceeding or case.

It really is a situation of trying to set up an equitable situation for both the Government and the person involved in the litigation or proceeding.

Obviously, anything that is done in this area will be an improvement over what we have today. If the committee did not see fit to go as far as we do, obviously that would be the committee's judgment, and we would accept it.

Senator HATCH. The subcommittee heard some very interesting testimony from CIA Director Casey about the impact of FOIA on our intelligence agency. Could you explain how you would prefer to deal with the problems raised by Director Casey?

Mr. ROSE. I am very familiar with Director Casey's testimony. I believe Admiral Inman has also testified on this subject, and I believe the Deputy Director of the National Security Agency has also testified to the problems that the Freedom of Information Act poses to these secret intelligence agencies in the intelligence community.

In my personal judgment, they have made a very persuasive case with regard to these problems; and they have raised a very fundamental question as to whether it makes practical sense to have this kind of a statute applying at all to those agencies, given the amount of burden that it creates for them and given the perceptions of inability to keep secrets that it creates in their sources abroad versus what in fact can be released under this act to them.

The administration has taken no position with regard to this subject. We are not addressing this subject in the bill today, and I am not prepared to give you an administration position today on that issue.

Senator HATCH. Thank you, Mr. Rose. We appreciate your articulate approach to this. We are going to study your bill with a great deal of interest and, hopefully, between the two bills come up with what really will be the best situation under the circumstances.

Mr. ROSE. Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Mr. Rose. We appreciate your being here today.

Without objection, your bill and the additional information you will provide will be included in the record at this point.

[Material was subsequently supplied for the record:]

Office of the Attorney General
Washington, D. C. 20530

IDENTICAL SUBMISSION
TO THE SPEAKER OF THE
HOUSE OF REPRESENTATIVES

October 15, 1981

Honorable George Bush
President of the United States
Senate
The Capitol Building
Washington, D.C. 20510

Dear Mr. President:

Enclosed for your consideration and referral is a legislative proposal, "To amend the Freedom of Information Act".

The proposal is a part of the Department of Justice's legislative program for the 97th Congress. The Office of Management and Budget has advised me that this legislation is in accord with the legislative program of the President. We urge the Congress to give this legislation its prompt and favorable consideration.

The Administration is firmly committed to the faithful implementation of the Freedom of Information Act by all federal agencies. The letter and the spirit of the Act require all agencies to respond promptly and fully to requests for information by the general public, except where this would interfere with other important government interests, which the several exemptions to the Act seek to protect.

We are, however, concerned that in some instances the Freedom of Information Act has been misused in ways that are inconsistent with the original objectives of the Congress. Certain requirements of the Act have interfered unduly with proper law enforcement activities and jeopardized national security functions. In addition, compliance with provisions of the Act has resulted in unnecessary burden and expense to the government.

Our review of the Act was prompted not only by the complaints of federal agencies but also by the increasing concerns regarding the burdens imposed by the Act that have been expressed by the courts. A very recent example concerns the requests for intelligence files made by Mr. Philip Agee, a private citizen who has announced a campaign to expose the Central Intelligence Agency officers wherever they are operating. Responding to Mr. Agee's requests has cost the American public nearly $500,000. A respected federal district court judge who heard the suit which arose over the requests stated that "[i]t is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." Agee v. Central Intelligence Agency, 517 F. Supp. 1335, 1341-42 n.5 (D.D.C. 1981).

Another recent opinion by the United States Court of Appeals for the Third Circuit stated:

> What concerns us particularly is that a law enforcement agency, the FBI, is being required to expend sorely needed resources, not to deal with the burgeoning problems of crime which seriously besets all our citizens, but to devote a large number of hours of exacting labor sorting out affidavits that were collected to apprehend crimes and prosecute offenders. Moreover, informants, once aware that copies of affidavits submitted to law enforcement agencies can be made public, might be inhibited from future cooperation.
>
> A further concern is that the use of the FOIA, in the fashion employed here, will impose an additional burden on the trial courts that are already overworked. It will make it necessary for them to review large numbers of records, such as had been requested here, in camera. And the fact that this procedure will be placed in an adversarial context will further prolong the process and add to its vexatious nature.
>
> Perhaps when Congress is made aware of the problems spawned by the use of the Act which we have identified here and on which Judge Adams has commented in a slightly different context in Ferri v. Bell, 645 F.2d 1213, 1226 n.17 (3d Cir. 1981), it will attempt to accommodate the concerns which we have expressed.

Lame v. United States Department of Justice, 654 F.2d 917, 929 (1981).

To remedy these and other shortcomings in the current Act, the Administration offers a series of amendments to the Freedom of Information Act to improve procedures for the disclosure of information and to give broader protection to certain types of information. The changes proposed by the amendments are as follows:

---The amendments would clarify several of the Act's exemptions and procedures to strengthen the protection given to information where disclosure would result in an unwarranted invasion of personal privacy, harm the public interest in law enforcement, injure the legitimate commercial interests of private parties who have submitted proprietary information to the government, or impede the effective collection of intelligence.

---The amendments would preclude the use of the Freedom of Information Act as a means to circumvent discovery rules by parties in litigation.

---The amendments would provide for expedited processing of requests from the media and others seeking information for broad public dissemination while establishing realistic time requirements for agencies to respond to requests and decide appeals.

---The amendments would establish procedures enabling submitters of confidential commercial or financial information to object to the government's release of such information.

---The amendments would permit the government to charge requesters fees that more closely reflect the actual costs of the government's search and review of documents.

---The amendments would add two new exemptions from the Act for records generated in legal settlements and records containing technical information the export of which is controlled by law.

We believe that these amendments meet the goal we set for ourselves when we undertook this review, to remedy the problems that have been identified while preserving the Act as an effective tool to keep the American public as informed as possible about the operations of its government. We look forward to working with Congress to achieve the passage of this legislation.

Sincerely,

William French Smith

A BILL

To amend the Freedom of Information Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Information Improvements Act of 1981".

AMENDMENTS RELATING TO THE OBLIGATION TO MAKE RECORDS AVAILABLE

SEC. 2. Section 552(a) of title 5, United States Code, is amended--

(a) in paragraph (2)--

(1) by adding in subparagraph (A) ", if the final opinions or orders are cited, used, or relied on as precedent by the agency" after "cases"; and

(2) by striking out "a clearly unwarranted" in the second sentence and inserting in lieu thereof "an unwarranted";

(b) by amending paragraph (3) to read as follows:

"(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by any United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester.

"(B) A requester shall not make or maintain a request under this paragraph for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party.

"(C) An agency may require by regulation that each request for records under this section include declarations by the requester that the requester, or any person upon whose behalf the requester acts in making the request, is

"(i) a United States person as defined in this section, and

"(ii) not barred by subsection (a)(3)(B) from making the request.

A request that does not comply with any such regulation requirement is not a proper request under this section."; and

(c) by adding the following new paragraphs at the end thereof:

"(7) An agency is not required to disclose any material requested under this subsection which consists of newspaper clippings, magazine articles, court records, publications available from the Government Printing Office, or any similar items

which are in the public record or otherwise publicly available, but the agency shall inform the requester of the nature of such public source materials.

"(8) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.".

AMENDMENTS RELATING TO FEES

SEC. 3. Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended--

(a) by striking out the second sentence and inserting in lieu thereof the following: "The schedule may provide for the payment of all costs reasonably attributable to responding to the request, including the costs of searching for, reviewing, and duplicating requested records. If the requested records contain commercially valuable technological or reference information, generated or acquired by the government at substantial cost to the public, fees may be charged which reflect the fair market value or royalties or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the information, its cost to the government, and any public interest served by its disclosure."; and

(b) by adding after the word "determines" in the last sentence ", in the exercise of its discretion,".

AMENDMENTS RELATING TO THE ADMINISTRATIVE RIGHTS OF SUBMITTERS OF INFORMATION

SEC. 4. Paragraph (4) of section 552(a) of title 5, United States Code, is amended--

(a) by redesignating subparagraph (B) as subparagraph (E), and by redesignating subparagraphs (C) through (G) as subparagraphs (J) through (N), respectively; and

(b) by adding after subparagraph (A) the following new subparagraphs:

"(B) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which--

"(i) a submitter may be required to designate, at the time of submission, any information consisting of trade secrets, commercial or financial information, or other commercially valuable information, which is exempt from disclosure under subsection (b)(4);

"(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter within a reasonable time prior to a decision to release any such information;

"(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure specifying all grounds upon which it is contended that the information should not be disclosed; and

"(iv) the agency shall notify the submitter of any final decision to release such information.

"(C) An agency is not required to notify a submitter pursuant to subparagraph (B) if--

"(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to paragraph (4)(B)(i), if such designation is required by the agency;

"(ii) the agency determines, prior to giving such notice, that the request should be denied;

"(iii) the disclosure is required by law (other than this section); or

"(iv) the information lawfully has been published or otherwise made available to the public.

"(D) If a submitter has objected, pursuant to subparagraph (B)(iii), to disclosure of information that the agency determines to be exempt from disclosure under subsection (b)(4), the agency shall not release such information unless the agency determines in writing that the failure to disclose the records would injure an overriding public interest and disclosure is not otherwise prohibited by law.".

AMENDMENTS RELATING TO JUDICIAL REVIEW

SEC. 5. Paragraph (4) of section 552(a) of title 5, United States Code, is amended--

(a) by amending redesignated subparagraph (E) to read as follows:

"(E) On complaint filed by a requester within 90 days from the date of final agency action or by a submitter prior to the release of submitted information, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction--

"(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester; or

"(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under subparagraph (B)(iii) or which would have been objected to had

notice been given as required by subparagraph (B)(ii).";

(b) by adding after subparagraph (E) the following new subparagraphs:

"(F) In an action based on a complaint--

"(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

"(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

"(G) The agency that is the subject of the complaint shall promptly, upon service of a complaint--

"(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

"(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(H) In any action in which a requester is an intervenor or is joined the court shall on timely motion of the requester transfer the action to a district court which would have had jurisdiction had the action been brought by the requester, unless the court otherwise directs for good cause shown.

"(I) In a case in which a record is withheld under subsection (b)(1), the court shall not enjoin the agency from withholding such record unless the agency's action is found to be arbitrary or capricious. In all other cases, the

court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information. The court shall maintain under seal any affidavit or record submitted in camera to the court in support of the applicability of any exemption, and shall stay any order requiring the release of records pending final judicial resolution of any appeal from such order."; and

(c) in redesignated subparagraph (L)--

(1) by adding "or any submitter who is a party to the litigation" after "United States"; and

(2) by striking out "complainant" and inserting in lieu thereof "requester".

AMENDMENTS RELATING TO THE TIME FOR AGENCY RESPONSE

SEC. 6. Paragraph (6) of section 552(a) of title 5, United States Code, is amended--

(a) in subparagraph (A)--

(1) by striking out "for records made under paragraph (1), (2), or (3) of this subsection" and inserting in lieu thereof "made under paragraph (1), (2), or (3) of this subsection for records which are sufficiently identified and limited that no more than eight working hours of search and review time are required to respond to the request, and which do not contain trade secrets, commercial or financial information, or other commercially valuable information provided by a submitter";

(2) in clause (i), by striking out "ten days (excepting Saturdays, Sundays, and legal public holidays)" and inserting in lieu thereof "ten working days"; and

(3) in clause (ii), by striking out "twenty days (excepting Saturdays, Sundays, and legal public holidays)" and inserting in lieu thereof "twenty working days";

(b) by amending subparagraph (B) to read as follows:

"(B) Except as provided in subparagraph (A), each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

"(i) within thirty working days after the receipt of the request--

"(a) determine whether to comply with such request, in whole or in part, and immediately notify the requester of such determination and the reasons therefor, and of the requester's right to appeal to the head of the agency any adverse determination; or

"(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed one year; and

"(ii) within thirty working days after the receipt of an appeal--

"(a) make a determination of the appeal; or

"(b) notify the requester of the estimated time period required for such determination, and the reasons therefor,

such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed six months.

If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.";

(c) by redesignating subparagraph (C) as subparagraph (E);

(d) by adding the following new subparagraphs after subparagraph (B):

"(C) Each agency shall promulgate regulations pursuant to notice and receipt of public comment, specifying the time periods under subparagraph (B). Such regulations shall provide for the shortest practicable time periods and shall take into account all relevant factors, including but not limited to--

"(i) the volume of requests and appeals received by the agency;

"(ii) the resources available to the agency for the processing of such requests and appeals;

"(iii) the volume of records required to be searched to locate all records responsive to the request or appeal;

"(iv) the volume of responsive records required to be reviewed for release pursuant to the request or appeal;

"(v) the need to search for or review records maintained in field facilities or other establishments that are separate from the agency office processing the request or appeal;

"(vi) the character of the records requested;

"(vii) the need for consultation, which shall be conducted with all practicable speed, with another agency or among two or more components of the agency having substantial subject matter interest therein; and

"(viii) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters.

"(D) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records and whose request for information will primarily benefit the general public may, as a matter of the agency's discretion, be given processing priority over other requesters."; and

(e) in redesignated subparagraph (E)--

(1) by striking out "person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and inserting in lieu thereof "requester";

(2) by adding after the first sentence the following new sentence: "If a requester files a complaint under paragraph (4)(E), the administrative remedies of a submitter of information contained in the records which are the subject of the request shall be deemed to have been exhausted."; and

(3) in the next to last sentence, by striking out "such person making such request" and inserting in lieu thereof "the requester, except that if the disclosure of records is objected to by a submitter pursuant to paragraph (4)(B)(iii), the agency shall not disclose the

records for fifteen working days after notice of the final decision to release the requested information has been forwarded to the submitter.".

AMENDMENTS RELATING TO EXEMPTIONS

SEC. 7. Section 552(b) of title 5, United States Code, is amended as follows:

(a) Paragraph (2) is amended by adding ", including such materials as (A) manuals and instructions to investigators, inspectors, auditors, and negotiators, and (B) examination material used solely to determine individual qualifications for employment, promotion, and licensing" after "agency".

(b) Paragraph (4) is amended to read as follows:

"(4) trade secrets, and commercial or financial information or other commercially valuable information obtained from any person if the information is privileged or if its release may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future;".

(c) Paragraph (6) is amended to read as follows:

"(6) records or information concerning individuals the release of which would constitute an unwarranted invasion of personal privacy, including compilations or lists of names and addresses that could be used for solicitation purposes;".

(d) Paragraph (7) is amended--

(1) in the introductory language--

(A) by striking out "investigatory records" and inserting in lieu thereof "records or information"; and

(B) by adding "or information" after "such records";

(2) by amending subparagraph (A) to read as follows:

"(A) reveal investigatory information relating to an ongoing investigation or enforcement proceeding,";

(3) by amending subparagraphs (D), (E), and (F) to read as follows:

"(D) tend to disclose the identity of a confidential source, including any foreign, state, or other public agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) disclose techniques, procedures, guidelines, or priorities for law enforcement investigations or prosecutions, (F) endanger the life or physical safety of any natural person, or"; and

(4) by adding the following new subparagraph at the end thereof:

"(G) disclose information relating to such categories of investigations of terrorism, organized crime, or foreign counterintelligence as are defined by the Attorney General by regulation or order;".

(e) Paragraph (8) is amended by striking out "or" at the end thereof.

(f) Paragraph (9) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon.

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(g) Subsection (b) is amended by adding the following new paragraphs after paragraph (9):

"(10) records generated by the United States or any party in connection with the settlement of a legal action in which the United States is a party or has an interest; or

"(11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license from an agency, unless the requester has obtained the appropriate approval, authorization, or license.".

AMENDMENTS RELATING TO REPORTING REQUIREMENTS

SEC. 8. Section 552(d) of title 5, United States Code, is amended--

(a) by striking out "calendar" the second and fourth places it appears and inserting in lieu thereof "fiscal";

(b) in paragraph (4), by striking out "subsection (a)(4)(F)" and inserting in lieu thereof "subsection (a)(4)(M)"; and

(c) in the next to the last sentence, by striking out "subsections (a)(4)(E), (F), and (G)" and inserting in lieu thereof "subsections (a)(4)(L), (M), and (N)".

AMENDMENTS RELATING TO DEFINITIONS

SEC. 9. Section 552(e) of title 5, United States Code, is amended to read as follows:

"(e) For purposes of this section--

"(1) 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) 'submitter' means any person who has submitted to an agency (other than an intelligence agency) trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information, in which the person has a commercial or proprietary interest;

"(3) 'requester' means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

"(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

"(5) 'working days' means every day excluding Saturdays, Sundays, and federal legal holidays;

"(6) 'record' means existing documentation of information in any form, including computer tapes and discs, but does not include system software in any form or documentation created for the personal convenience of any government employee or official.".

SECTION BY SECTION ANALYSIS

I. INTRODUCTION

The bill proposes amendments to the Freedom of Information Act, 5 U.S.C. § 552, in order to improve the administration of the Act, remedy unforeseen problems that have arisen under the Act, correct judicial constructions of the Act which do not comport with the original intent of Congress, and generally balance the public interest in disclosure of government information with the public interest in effective government. The proposed amendments would improve t... in several respects:

Fir , they would clarify several of the Act's exemptions an procedures in order to strengthen the protection given to information where disclosure would result in an unwarranted invasion of privacy, harm to the public interest in effective law enforcement, or harm to the legitimate commercial interests of private parties who have submitted information to the government, or where the threat of disclosure would harm the public interest in the effective collection of intelligence.

Second, the amendments would preclude the use of the Freedom of Information Act as a means to circumvent discovery rules by parties in litigation.

Third, the amendments would establish realistic time requirements for agencies to respond to requests and decide appeals, while assuring prompt responses to limited requests and requests which primarily benefit the general public.

Fourth, the amendments would establish procedures enabling submitters of confidential commercial or financial information to object to the government's release of such information.

Fifth, the amendments would permit the government to charge requesters fees that more closely reflect the

actual costs of the government's search for and review of documents.

Sixth, the amendments would add two new exemptions relating to records generated in legal settlements and technical information the export of which is controlled by law.

In general, the bill sets forth the proposed amendments to the Freedom of Information Act, by topic, in the order in which the affected provisions of the Act appear in current law. This section by section analysis describes the proposed amendments in the same order.

II. SECTION 1 OF THE BILL -- POPULAR NAME

Section 1 of the bill states that the Act may be cited as the "Freedom of Information Improvements Act of 1981".

III. SECTION 2 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(a) RELATING TO THE OBLIGATION TO MAKE RECORDS AVAILABLE

Section 2 of the bill would change the government's obligations under paragraphs (2) and (3) of section 552(a) in five ways: (1) it would relax the requirement that agencies index opinions and orders where those opinions and orders have no precedential value; (2) it would limit the right to make requests under the Act for disclosure of government records to "United States persons"; (3) it would restrict the use of the Act to supplement or circumvent discovery limitations; (4) it would free agencies from having to disclose information that is already publicly available; and (5) it would render the Act inapplicable to law enforcement informant records whenever such records are specifically requested by third parties.

A. Final Opinions and Orders of an Agency

Section 2(a) of the bill contains two proposed amendments to subsection (a)(2) of 5 U.S.C. § 552.

First, paragraph (1) of section 2(a) of the bill would amend subsection (a)(2)(A) of the Act to relieve an agency from the requirement that it make available for public inspection and copying all of its final opinions and orders if those opinions and orders have no precedential value. Under current law, an agency is required to index and make available for public inspection and copying all final opinions and orders whether or not the opinions and orders are ever used as precedent or have any value to the public.

This requirement can impose very expensive indexing burdens on agencies that provide little or no public benefit. For example, in National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975), the court held that the decisions denying federal prisoners' applications for parole are subject to the requirements of subsection (a)(2). As a result, some 200,000 of these one-page form letters -- which at most contain only routine data relating to the prisoner, his offense and sentence, but no further explanation of the government's reasoning in denying the application -- were collected, edited to delete the prisoners' names, placed in a public reading room, and indexed, although they had no direct precedential value and could not be meaningfully indexed. See 390 F. Supp. at 791 n.1, 793-94. The proposed amendment would eliminate the burdensome and costly requirement that decisions and orders without precedential value be indexed and made available.1/ The few persons who might be interested in such decisions still could obtain them by filing requests pursuant to subsection (a)(3), rather than subsection (a)(2), of the Act. An agency is precluded from relying on, using, or citing as precedent any final opinion or

order which is not indexed and made available under subsection (a)(2).

Second, paragraph (2) of section 2(a) of the bill would amend subsection (a)(2) of 5 U.S.C. § 552 to permit an agency to delete identifying details in published or otherwise publicly available opinions, statements of policy, interpretations, or staff manuals or instructions in order to prevent "an unwarranted invasion of personal privacy." Under current law, such a deletion is permitted only to prevent a "clearly unwarranted" invasion of privacy. The proposed amendment would permit the agency to decide more readily than under current law to delete identifying details, consistent with the current language of subsection (b)(7)(C) and the proposed amendments to subsection (b)(6) of 5 U.S.C. § 552 in section 7(c) of the bill.

B. Requests for Agency Records

Section 2(b) of the bill redesignates existing paragraph (3) of 5 U.S.C. § 552(a) as paragraph (3)(A), makes several amendments in that provision, and adds new subparagraphs (B) and (C) to paragraph (3).

1. Requests Limited to "United States Persons"

Under current law, an agency is required to comply with any request for records covered by 5 U.S.C. § 552(a)(3) made by "any person." The proposed amendment in section 2(b) of the bill would require the agency to make information available only to a requester who is a "United States person". Section 9 of the bill would add a definition of the term "United States person" in a new subsection (e)(4) of 5 U.S.C. § 552, to include a United States citizen, an alien lawfully admitted for permanent residence, and certain corporations and unincorporated

associations. The definition of "United States person" follows the definition set forth in section 101(i) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801(i)), with certain exceptions. Restricting the right to make requests to United States persons would reverse the present rule that "any person," including foreign nationals and governments, can use the Freedom of Information Act to secure information.2/ This proposed amendment is consistent with the purpose of the Freedom of Information Act to inform the American public of government actions. It would also prevent the use of the Freedom of Information Act by foreign nationals and governments for purposes which may be contrary to the national interest.

2. Freedom of Information Act Not a Discovery Device

Section 2(b) of the bill would also enact a new subsection (a)(3)(B) of 5 U.S.C. § 552 to prohibit a party to a judicial or adjudicatory administrative proceeding, or any requester acting for such a party, from using the Freedom of Information Act as a discovery device in connection with the proceeding. Most government agencies report significant numbers of such requests, whose purpose is to avoid applicable rules of discovery and sometimes, where the government is a party, to harass and burden government agencies. The prohibition would apply in either civil or criminal proceedings, whether or not the United States is a party to the proceeding, whenever a party files or maintains a request relating to the subject matter of that proceeding.

The Supreme Court has recognized that the "FOIA was not intended to function as a private discovery tool." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). Nothwithstanding the fact that the Freedom of Information Act was not intended as a discovery device, a requester's rights under present law "are neither increased

nor decreased" because of his status as a litigant. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). As a result, the Freedom of Information Act has been widely used to discover government documents for use in both administrative and judicial proceedings.

In civil cases, parties openly use the Freedom of Information Act to circumvent the judicial discovery requirements that they show a need for the requested information, that the information is relevant to the case, and that compliance with the request would not be unreasonably harassing, oppressive or burdensome. See Fed. R. Civ. P. 26. Government attorneys working on a case are forced to divert their attention from preparing the case to complying with a Freedom of Information Act request filed by a party opponent. The resulting diversion of resources to respond to such requests substantially impairs the government's capacity to prepare and successfully carry forward to a conclusion many of its cases.

Similarly, in criminal cases a defendant seeking discovery information must ordinarily demonstrate not only the relevance of the information sought, but also that the request is "reasonable" and within the scope of criminal discovery. See Fed R. Crim. P. 16(a). In addition, a criminal defendant's request for discovery may trigger a government right to reciprocal discovery. Fed. R. Crim. P. 16(b). Criminal defendants have, in practice, however, made frequent use of Freedom of Information Act requests, often close to scheduled trial dates, to disrupt the prosecutor's case preparation or delay the trial while disputes over the Freedom of Information Act request are resolved by the court. Most courts have ruled that the use of the Freedom of Information Act to supplant ordinary criminal discovery is improper.3/ However, some courts have ruled that related Freedom of Information Act requests are acceptable during a criminal trial and that the district court should resolve issues respecting such

requests in the pending criminal action.[4] This ability to make requests before and during criminal trials disrupts trial proceedings and upsets the discovery scheme established under the Federal Rules of Criminal Procedure. This proposed provision seeks to limit such abuses of the Freedom of Information Act.

3. Statement of Eligibility of Requester

To implement these proposed amendments, section 2(b) of the bill would also add subsection (a)(3)(C) to 5 U.S.C. § 552, to permit an agency to require by regulation that each request for records under the Freedom of Information Act include declarations that the requester, or any person upon whose behalf the requester acts, is a United States person and is not barred from making a request because he is a party to a related civil or criminal proceeding. A request that does not comply with any such regulation requirement would not be deemed a proper request under the Act.

C. New Provisions to 5 U.S.C. § 552(a)

Section 2(c) of the bill would add two new paragraphs at the end of 5 U.S.C. § 552(a). The first new paragraph, paragraph (7), would provide that an agency would not have to produce requested material that consists of newspaper clippings, magazine articles, court records, publications available from the Government Printing Office, or any similar items that are in the public record or otherwise publicly available. If the agency chose not to produce such public source information, it would be required to inform the requester of the availability of the information. This provision would make processing of requests more efficient and avoid unnecessary fees to requesters,[5] without limiting public access to information.

The second new paragraph, paragraph (8), would provide that § 552 shall not apply to informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought according to the informant's name or personal identifier by a third party. This provision would address a serious problem that has arisen for some law enforcement agencies, particularly for the Federal Bureau of Investigation, when requests have been received for the files of named individuals who are or have been confidential sources. Under current law, criminal organizations can use the Act to attempt to uncover suspected informants in their midst, simply by asking for the records of individuals whom they suspect of being informants. In such a case, it is not sufficient that the Federal Bureau of Investigation could respond that it is withholding the informant's file under exemption (b)(7)(D), since specifying an exemption or even acknowledging the existence of records relating to the informant could compromise the source. New paragraph (8) would resolve this problem by excluding the informant files of law enforcement agencies from the ambit of the Act when those records are requested by name or personal identifier by a third party. In this way, the agency could limit its response to any collateral records or, if no such other records existed, properly respond that it has found no records within the scope of the Act.

IV. SECTION 3 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(a) RELATING TO FEES

Section 3(a) of the bill would make two important changes in subsection (a)(4)(A) of 5 U.S.C. § 552 relating to the fees charged to requesters of information for the costs of searching, reviewing, and duplicating requested records. Section 3(b) of the bill would codify the rule developed by the majority of courts for judicial review of cases where an agency denies a waiver or reduction of fees.

A. Recovery of Full Processing Costs

Section 3(a) of the bill would provide that the schedule of fees charged by an agency for responding to a request may "provide for the payment of all costs reasonably attributable to responding to the request, including the costs of searching for, reviewing, and duplicating requested records." Under current law, the agency may not charge for any costs other than the direct costs of search and duplication.

Clearly one of the unexpected developments from the 1974 amendments to the Act has been the great volume of requests and the expense of processing those requests, particularly requests which serve only commercial or private interests rather than the interests of the public. In contrast to Congress' estimate that the 1974 amendments to the Act would cost no more than $40,000 to $100,000 annually to implement, the direct cost of compliance with the Act by all agencies rose to at least $57 million by 1980 (of which only 3% or 4% was recovered from requesters). Many hundreds of federal employees -- over 300 at the FBI alone -- devote all their work time to complying with Freedom of Information Act requests. Countless others spend part of their time reviewing files in response to requests concerning projects they are working on.

Frequently, the cost to the government of search and review bears little correlation to the public interest in disclosure. It appears that a majority of all Freedom of Information Act requests are filed by or made on behalf of corporations for purely private commercial reasons. In some instances, individuals too have made excessive use of the Act, at public expense, for reasons that are purely personal, serve no public interest, and may in some cases even be contrary to the public interest. In one case, a single Freedom of Information Act request for voluminous

Central Intelligence Agency documents by an ex-agent, Mr. Philip Agee, cost the public more than $400,000 to process. Agee v. Central Intelligence Agency, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). The bill is intended to end public financing of the processing of requests which do not benefit the general public.

Accordingly, the bill would allow each agency to promulgate a standard schedule of fees for the recovery of the full costs involved in searching for, reviewing, redacting, and duplicating requested records. This would bring the Act much closer to the general government policy established in 31 U.S.C. § 483a, which requires that all agencies providing "publications, reports, documents" or other privileges of value to private parties should charge fees therefor so as to operate on a self-sustaining basis. This would insure that those who would take advantage of the Freedom of Information Act mechanism for purely personal or commercial purposes are not subsidized at taxpayer expense, and would encourage all requesters to make reasonable efforts to narrow excessively broad requests.

The bill would retain the provision in current law that requires an agency to waive or reduce the fee whenever a request serves the public interest. Such waivers are intended to assure that requesters, such as representatives of the media and public interest groups, whose work would primarily benefit the general public, would have ready, inexpensive access to government records. In addition, many agencies routinely waive all fees below a specified minimum. The bill would have no effect upon such practices.

B. Fees For Valuable Government Information

Section 3(a) of the bill also would add a new provision to 5 U.S.C. § 552(a)(4) to permit an agency to

charge additional or alternative fees for technological or reference information that has a commercial market value and that was generated or acquired by the government at substantial cost to the public. These fees would reflect the fair market value of the information or impose royalties for its use by the requester, and would be determined by the agency after taking into account such factors as the estimated commercial value of the information, the cost to the government of acquiring the information, and any public interest served by its disclosure to the requester. The present Act does not take into account the fact that such valuable information must now be turned over to private parties for fees that reflect little more than the cost of copying.6/ Consistent with existing federal law, such as 31 U.S.C. § 483a, this provision would permit the government to recover the costs of developing or acquiring commercially valuable information.

C. Review of Agency Determinations

Section 3(b) of the bill would clarify the standard of review of agency determinations on applications for a waiver or reduction of fees. At present, almost all courts follow the rule that an agency's denial of such applications is an exercise of administrative discretion that may be reversed only when the agency action is arbitrary or capricious.7/ However, at least one court has determined to review such agency action on a de novo basis.8/ The bill would amend subsection (a)(4)(A) to codify the majority rule permitting an agency to waive or reduce fees "in the exercise of its discretion."

V. SECTION 4 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(a) RELATING TO THE ADMINISTRATIVE RIGHTS OF SUBMITTERS OF INFORMATION

Section 4(a) of the bill would redesignate existing subparagraph (B) of 5 U.S.C. § 552(a)(4) as subparagraph (E), and would redesignate subparagraphs (C)

through (G) as subparagraphs (J) through (N), respectively. Section 4(b) of the bill would add new paragraphs (B), (C), and (D), which establish procedures creating administrative rights for submitters of proprietary information.

A. Notice to Submitters

Proposed subparagraph (B) would require agencies to promulgate regulations implementing the procedures that would be established by clauses (i) through (iv) of that subparagraph. Clause (i) would allow an agency to require submitters to designate at the time of submission information which they claimed consisted of trade secrets, commercial or financial information, or other commercially valuable information which is exempt from disclosure under subsection (b)(4). The proposed provision would allow each agency to determine, in accordance with its own practices and the types of information it receives, whether to require such a designation, the manner in which this designation would be made, and the degree of specificity that would be required.

Clause (ii) of this subparagraph would provide that, within a reasonable time before the agency made a final decision regarding the release of information consisting of trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information, the agency would be required to give notice to the submitter that a request for such information had been received.

Under clause (iii), the submitter would be allowed to submit written objections to the agency, within ten working days from the date of the forwarding of notification, stating all the grounds upon which the submitter contended that the information should not be released. Under clause (iv), the agency would be required to notify the submitter of any final decision to release materials provided by the submitter.

Under new subparagraph (C), an agency need not notify the submitter that a request has been made for information provided by the submitter or that the agency has made a final decision to release such information, if the information is not designated as exempt under subsection (b)(4) and such designation is required by agency regulations. Notice to the submitter would also not be required if the agency decided to deny the request for disclosure, if a law other than the Freedom of Information Act required disclosure, or if the information had already been lawfully made available to the public.

These amendments would assure that submitters of trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information would be notified of a request for disclosure of the information. They are intended to relieve the widespread fear among business submitters that the Freedom of Information Act may be used by their competitors to acquire commercially valuable information which they have given the government. Moreover, these provisions would permit a submitter, who is frequently more aware of the commercial value of information than is the government, to inform the government why the submitter believes the information should not be released. For these reasons, these proposed provisions would be beneficial not only to the submitter, but also to the government.

B. Restrictions on Agency Disclosure

Under proposed subsection (a)(4)(D), an agency could not disclose information exempt from disclosure pursuant to subsection (b)(4) of the Act over the objection of a submitter unless "the failure to disclose the records would injure an overriding public interest and disclosure is not otherwise prohibited by law." The exemption now provided under subsection (b)(4) of the Act does not itself limit an agency's discretion to disclose information. See

Chrysler Corp. v. Brown, 441 U.S. 281, 292-94 (1979). Proposed subsection (a)(4)(D) would impose an affirmative limitation on discretionary releases of information exempted under subsection (b)(4). A decision to release information under this provision would be subject to judicial review under the provisions of proposed subsection (a)(4)(E).

Proposed subsection (a)(4)(D) would not, however, provide requesters a cause of action to seek disclosure of exempted information on the ground of "overriding public interest." Nor would this provision authorize disclosure where it is otherwise forbidden by law.

VI. SECTION 5 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(a)(4) RELATING TO JUDICIAL REVIEW

Section 5 of the bill would make several procedural and substantive revisions to the judicial review provisions of 5 U.S.C. § 552(a)(4). Section 5(a) of the bill would amend redesignated subsection (a)(4)(E) (currently subsection (a)(4)(B)) to include a statute of limitations. Section 5(a) of the bill would also provide for jurisdiction in the district courts for suits by submitters of information to enjoin an agency's disclosure of information.

Section 5(b) would add a series of procedural provisions, subparagraphs (F), (G) and (H), to subsection (a)(4), relating to suits by submitters and by requesters. Section 5(b) would also add a new subsection (a)(4)(I) that would make several substantive and procedural revisions in the Act's standards for judicial review, which are presently contained in the second sentence of subsection (a)(4)(B) of the Act. Finally, section 5(c) of the draft bill would amend the attorney fees provision of redesignated subsection (a)(4)(L) (currently subsection (a)(4)(E)) to allow requesters who substantially prevail to recover

attorney fees from a submitter participating in the litigation. The following paragraphs discuss these proposed changes by topic.

A. Statute of Limitations

The present Act contains no time limit for a requester to initiate a judicial action after an agency's final denial of a request. The bill would amend redesignated subsection (a)(4)(E) of the Act (currently subsection (a)(4)(B)) to require that suits by requesters must be brought within 90 days of the agency's final administrative action. The bill would not set a specific limitations period for actions by submitters. However, it would establish, as a prerequisite to district court jurisdiction under proposed subsections (a)(4)(E) through (a)(4)(I), that the submitter must file a complaint before the disclosure of the information.

B. Subject Matter Jurisdiction

The bill would amend redesignated subsection (a)(4)(E) of the Act (currently subsection (a)(4)(B)) to vest the district courts with jurisdiction to enjoin an agency from any disclosure of trade secrets, commercial or financial information, or other commercially valuable information which was objected to by a submitter under subsection (a)(4)(B)(iii) (or which would have been objected to had the submitter received the required notice from the agency pursuant to subsection (a)(4)(B)(ii)). Under the amended provision, the submitter may file a complaint at any time prior to the disclosure of the information by the agency.

This provision would create a right of action for submitters within the structure of the Freedom of Information Act. Under present law, submitters have no such right of action under the Freedom of Information Act, but must

resort to section 10 of the Administrative Procedure Act, 5 U.S.C. § 706, in order to safeguard confidential business information from disclosure by the government in possible violation of the Trade Secrets Act, 18 U.S.C. § 1905. Chrysler Corp. v. Brown, 441 U.S. 281, 285, 317-18 (1979). The rights of submitters as outlined by the Supreme Court in Chrysler are inadequate to protect against the disclosure of material which should properly be kept confidential. For that reason, this bill would establish procedural rights in the Freedom of Information Act itself.

C. Personal Jurisdiction

Proposed subsection (a)(4)(F) would provide the district courts with personal jurisdiction, in any suit filed under the Act, over all requesters and submitters of particular information. If a requester filed a complaint to compel disclosure of particular information, the district court in which the complaint was filed on its own motion would have jurisdiction over any submitter of the information.9/ Similarly, in a suit by a submitter, the court would have jurisdiction over any requester of the information. These proposed provisions would assure that an adverse party receives notice of the complaint, has the right to intervene, and will be bound by the court's decision.

D. Notice of Litigation

Proposed subsection (a)(4)(G) would require agencies to notify requesters and submitters whenever a suit is brought concerning a particular request or submission. If a requester of information concerning trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information filed a complaint to compel disclosure, the agency would be required to notify each submitter of that information that the complaint had been filed. Similarly,

if a submitter filed a complaint to enjoin disclosure of such information, the agency would be required to notify each requester.

E. Venue

Proposed subsection (a)(4)(H) would provide that a requester who intervenes or is joined in an action under the Act may move to transfer the action to a district court that would have had jurisdiction had the action been brought by the requester. The court should not deny such a motion except for good cause shown.

F. Standard for Judicial Review of Exemptions Under 5 U.S.C. § 552(b)(1)

The bill would relocate the second sentence in the existing subsection (a)(4)(B) of the Act, which sets forth the standards for judicial review of agency denials of requests under the Act, into new subsection (a)(4)(I). Subsection (a)(4)(I) would modify the current standard of de novo review where the requested information is withheld by an agency pursuant to exemption (b)(1). In such cases, the court could order disclosure of such classified information only if it finds that the agency decision to withhold the material was arbitrary or capricious. With respect to all other exemptions, however, the bill would not affect the de novo standard of review.

This recommended change in the applicable standard of judicial review in cases where an agency withholds information pursuant to exemption (b)(1) reflects the particularly sensitive nature of documents relating to national security and foreign policy and the need to give substantial deference to an agency's classification decisions. In the Conference Report on the 1974 amendments to the Act, Congress made clear that even with a de novo

standard of review, the court should give "substantial weight" to an agency's explanation of its classification actions.10/ In construing the Act's present provisions for de novo review of national security exemptions under exemption (b)(1), the United States Court of Appeals for the District of Columbia Circuit has noted that "[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information,"11/ and that "this is precisely the sort of situation where Congress intended the reviewing courts to respect the expertise of an agency."12/

Indeed, that same court has determined that summary judgment on the basis of the agency's affidavit alone should be granted in cases involving classified information where the affidavit shows merely the "plausibility" of the alleged harm of disclosure in a "reasonably detailed manner."13/ While the Act provides that a reviewing court may, in cases where it is necessary and appropriate, review such documents in camera to evaluate the agency's classification decision, the court should not be called upon, in effect, to make the initial classification decision. A change to the traditional Administrative Procedure Act standard of review for arbitrary or capricious action from the present de novo standard would be more consistent with the courts' need to give "substantial weight" to an agency's "expertise".

G. Burden of Proof Upon Submitters

Proposed subsection (a)(4)(I) of the Act would also provide that in judicial proceedings seeking to prevent the agency from disclosing information, the submitter bears the burden of demonstrating that such information should not be disclosed.

H. Additional Procedural Changes in Suits Under the Freedom of Information Act

Section 5(b) of the bill would also provide, in proposed subsection (a)(4)(I) of the Act, two procedural rules for litigation under the Act.

First, this revision would contain new language to clarify the requirement that the court maintain under seal the records and affidavits submitted *in camera* to the court in support of an exemption from disclosure. *In camera* review of confidential documents or explanatory affidavits may be appropriate in particular cases where the court determines that it cannot discharge its reviewing function based on information in the public record.14/ However, because *in camera* affidavits explain the significance of the disputed documents and put them into a broader context, the affidavits submitted by agencies are frequently as sensitive or even more sensitive than the records themselves. Without the assurance that such affidavits will not be disclosed, the agency may be faced with a serious dilemma in attempting to justify a withholding. The agency may risk summary judgment against it if it does not provide the court with confidential information justifying its position, yet risk greater disclosure of confidential information in the course of providing the court with an explanation justifying the withholding. Although almost all courts have respected the confidentiality of materials submitted *in camera*, there have been a few instances when this has not been done.15/ This amendment would provide that all materials submitted *in camera* would be maintained under seal.

Second, proposed subsection (a)(4)(I) would require the court to stay any order to release records pursuant to the Freedom of Information Act pending final determination of any appeal. Because disclosure of disputed documents prior to the decision on appeal would effectively moot the government's position, a provision

that would provide for the stay of such disclosure orders is essential to preserve the Government's rights of appeal. See Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979).16/ The amended provision would make the stay mandatory, not discretionary as under present law.

I. Attorney Fees

Under present law, subsection (a)(4)(E) authorizes a court, in its discretion, to allow attorney fees and other litigation costs in favor of a requester who "substantially prevails" in litigation with the government. Section 5(c) of the bill would change the language of subsection (a)(4)(E) (which is redesignated as subsection (a)(4)(L) by section 4(a) of the bill) to provide for the award of attorney fees against submitters. The current Act only allows the assessment of attorney fees against the United States. However, in actions where both a submitter and a requester are parties, the government might be a relatively disinterested stakeholder involved in the litigation only because the disputed information is in its possession. In such cases, this provision would allow the court to charge the costs and attorney fees of a requester who substantially prevails against a submitter rather than against the United States. As under present law, the provision would authorize the award of attorney fees only in favor of requesters who substantially prevail, and even then the award would be discretionary.

VII. SECTION 6 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(a)(6) RELATING TO THE TIME FOR AGENCY RESPONSE TO REQUESTS

Section 6 of the bill would revise the provisions of section 552(a)(6) of the Act that relate to time limits to make time limits more realistic and to provide for prompt response in those cases where expedited processing is necessary to serve the public interest.

A. Existing Time Limits for Agency Response to Requests

The Act currently provides that within ten working days an agency must make an initial determination whether to disclose the requested documents and, if the decision is made not to disclose the requested documents, to notify the requester of the reasons why documents are exempt. The agency thereafter has twenty working days to determine a requester's appeal of an adverse decision. Upon notice to a requester, an agency may extend these time limits for ten days in "unusual circumstances", such as where there is a need for additional time to search for and collect the documents from distant offices, to examine a voluminous amount of records, or to consult other agencies on the records. If an agency fails to comply with these deadlines, the requester is deemed to have exhausted his administrative remedies and may file a suit in district court to compel disclosure. Section 552(a)(6)(C), nevertheless, permits the court to allow, in "exceptional circumstances", additional time for agency processing, provided that the agency is exercising "due diligence".

The complexity and sheer volume of the requests received by many agencies often render compliance with the current time limits impossible. Recognizing the inherent inability of many agencies to process requests within the specified time limits, many courts have freed agencies of the need to comply with time limits by resorting to use of the "exceptional circumstances" and "due diligence" provisions in section 552(a)(6)(C). In the leading case, Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (1976), the United States Court of Appeals for the District of Columbia Circuit ruled that

> 'exceptional circumstances exist' when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of

> subsection (6)(A), and when the agency can show that it 'is exercising due diligence' in processing the requests.17/

Accordingly, the court ruled that, under those circumstances, the Act's time limits "become not mandatory but directory." Id. It is then sufficient for the agency to process all requests on a first-in, first-out basis, unless the requester can demonstrate to a court "exceptional need or urgency" for preferential treatment. Id.

The time limits in their present form cause serious problems both for the agencies and for the requesters. Agencies are frequently pressed to engage in hasty processing, which increases the likelihood of premature denials, unnecessary litigation, and serious errors. For requesters, the inability of many agencies to meet the rigid deadlines of the Act may often lead to a general dissatisfaction with the Act's operation as well as needless litigation. Moreover, the present "first-in, first-out" system prevents agencies that have a backlog of requests from responding promptly even to small Freedom of Information Act requests when their processing is congested, unless the requester can demonstrate "exceptional need or urgency." Members of the public and the news media are often unable to get timely responses from agencies that receive a large volume of requests.

B. Proposed New Time Limits for Agency Response to Requests

Section 6 of the bill would amend subsection (a)(6) of the Act to create a more flexible system that would permit each agency to consider the amount of work required by a request.

1. Limited Requests

Proposed subsection (a)(6)(A) would facilitate prompt processing of limited requests. The existing ten

and twenty-day time limits would continue to apply to all requests "which are sufficiently identified and limited" so that no more than eight working hours of search and review time are required to respond to a request, and which do not request disclosure of records that contain trade secrets, commercial or financial information, or other commercially valuable information provided by a submitter. The latter limitation on expedited processing is necessary to give the agency time to provide the notice to the submitter required under proposed section 552(a)(4)(B)(ii) and to receive any objections to disclosure the submitter may have.

Section 6(a) of the bill would also make a technical change in subsection (a)(6)(A) to conform to the new definition of "working days" in amended subsection (e)(5). No change in the manner of calculating the time periods is intended.

2. Other Requests

Section 6(b) of the bill would make important revisions to the time limits and the scope of existing 5 U.S.C § 552(a)(6)(B). Under existing law, subsection (a)(6)(B) allows an agency an additional ten days beyond the mandated ten-day limit for responses only where there are specified "unusual circumstances" relating to the volume of records searched, the need to acquire records from field offices, and the need to consult with other agencies or components of the same agency. Under the proposed revision to subsection (a)(6)(B), each agency would be allowed up to 30 working days to determine whether to comply with requests for records that would require more than eight hours to process or which seek trade secrets, commercial or financial information, or other commercially valuable information. If the agency were unable to complete the processing within 30 days, it would have to notify the requester of the length of time it would take to process the request. Similarly, the agency would, in such

cases, have 30 days in which to determine appeals or notify a requester how long it would take to determine the appeal. An agency's deadlines for compliance must be as short as practicable, but in no event longer than one year for processing a request or six months for determining an appeal.

Section 6(c) of the bill would redesignate existing subsection (a)(6)(C) as subsection (a)(6)(E). New paragraph (6)(C) of section 552(a), added by section 6(d) of the bill, would direct each agency to promulgate regulations, after notice and opportunity for public comment, setting forth time periods for processing requests and appeals. Proposed paragraph (6)(C) lists a number of factors to be considered, including those contained in existing subsection (a)(6)(B) as well as those suggested by the court in Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976). The agency would consider, among other factors, the volume of requests and appeals received by the agency, the resources available to the agency for processing the requests and appeals, the volume of records required to be searched, the nature of the records requested, and, where appropriate, the need to give submitters an opportunity to object.

C. Expedited Access to Records

Section 6(d) of the bill would also add subsection (a)(6)(D) to the Act. This new provision would require each agency to promulgate regulations whereby a requester who can demonstrate a compelling need for expedited processing and whose request will primarily benefit the general public may be given processing priority over other requesters.

Because of the lengthy periods of time often required to respond to requests, the Act is sometimes virtually useless to certain requesters, such as the current

events media, who require a timely response. Existing law does not permit an expedited response to requesters unless they can satisfy the "exceptional urgency" test established in Open America, supra. This provision would allow an agency to give requesters such as the current events media processing priority in order to make the Act a more useful device for the dissemination of information to the public.

D. Other Amendments Relating to the Time for Agency Response to Requests

Section 6(e) of the bill would make three procedural amendments to the redesignated subsection (a)(6)(E) (currently subsection (a)(6)(C)).

Section 6(e)(1) of the bill would make a technical change to conform the language of the paragraph to the new definition of "requester" in new subsection (e)(3), as added by section 9 of the bill. This is not a substantive change.

Section 6(e)(2) of the bill would add a sentence to redesignated subsection (a)(6)(E) of the Act to make clear that a submitter of information is deemed to have exhausted his administrative remedies if the requester files a complaint in the district court pursuant to redesignated subsection (a)(4)(E) of the Act. The submitter would be able to intervene in the requester's civil action pursuant to the provisions of proposed 5 U.S.C. § 552(a)(4)(F)(i) (section 5(b) of the bill) without awaiting further agency action, even if the agency had not yet made a final decision to release the submitter's information.

Section 6(e)(3) of the bill would amend the next to last sentence of redesignated subsection (a)(6)(E), which requires the agency to make records available to a requester promptly upon a determination to comply with his request. Section 6(e)(3) of the bill would provide an exception to this requirement if a submitter made an

objection pursuant to proposed subsection (a)(4)(B)(iii), as added by the bill. If such an objection is made, the agency would have to delay disclosure of the records for fifteen working days in order to allow the submitter to seek injunctive relief against disclosure pursuant to proposed subsection (a)(4)(E).

VIII. SECTION 7 OF THE BILL -- PROPOSED AMENDMENTS TO 5 U.S.C. § 552(b) RELATING TO EXEMPTIONS

Section 7 of the bill would make a number of important revisions and additions to the exemption provisions of 5 U.S.C. § 552(b).

A. Internal Agency Rules and Practices

Section 7(a) of the bill would add two new subparagraphs to 5 U.S.C. § 552(b)(2). Proposed subparagraph (A) of exemption (b)(2) would make clear that materials whose confidentiality is necessary to effective law enforcement and other vital government functions are exempt from disclosure. Such materials include manuals and instructions to investigators, inspectors, auditors and negotiators. Although materials of this nature are arguably protected under present law, the confusion engendered by judicial attempts to reconcile purported inconsistencies in the legislative history make the extent of the protection afforded by exemption (b)(2) uncertain.[18/]

The legislative history of exemption (b)(2) has proved confusing to the courts that have been called upon to interpret it. The Senate committee report on the exemption stated that it related only to internal personnel rules and practices of an agency, such as the agency's rules about its employees' use of parking facilities or its policies concerning sick leave.[19/] The House committee report, on the other hand, indicated that the exemption should protect from disclosure the operating rules, guidelines and manuals of procedure for government investigators

or examiners.[20] Adding to this confusion is the fact that the legislative history of a related provision of the Act, subsection (a)(2)(C) (which requires an agency to make available to the public "administrative" staff manuals and instructions to staff that affect a member of the public) indicates that Congress intended only for staff manuals of a purely routine, administrative nature to be disclosed. Both the Senate and the House committee reports on the Freedom of Information Act stated that manuals containing instructions to law enforcement personnel or setting forth guidelines for auditing and inspection procedures should not be disclosed.[21]

The difficulty courts have encountered in reconciling this conflicting legislative history has produced a body of conflicting case law concerning the scope and meaning of the present exemption (b)(2) for law enforcement manuals.[22] Similarly, courts are divided concerning the protection exemption (b)(2) presently affords guidelines for audits and investigations.[23]

The proposed amendment would expressly protect confidential information in manuals and instructions to investigators, inspectors, auditors, and negotiators from disclosure. This change would also complement the amendments to section (b)(7)(E) relating to guidelines or priorities for law enforcement investigations or prosecutions.

Negotiators are included in this list in recognition of the fact that the government has a legitimate need to maintain the confidentiality of its instructions to staff in contexts other than law enforcement. Thus, the term "negotiators" is not limited to law enforcement personnel who are called upon to negotiate the settlement of pending and impending litigation, but applies as well to agency staff who conduct negotiations for the procurement of goods and services, the acquisition of lands, the resolution of labor-management disputes, the release of hostages, or any other negotiations conducted in the course of

carrying out a legitimate government function where the release of such instructions or manuals may jeopardize the success of the negotiations.

Proposed subparagraph (B) is added to exemption (b)(2) to exempt testing or examination materials used to determine individual qualifications for employment, promotion, and licensing. This amendment is intended to protect from disclosure material that would compromise the objectivity or fairness of the testing, examination or licensing process within various agencies. Such a provision exists now in the Privacy Act of 1974, 5 U.S.C. § 552a(k)(6), and inclusion of this paragraph in the Freedom of Information Act would promote consistency between the two statutes.

B. Commercially Valuable Information

Section 7(b) of the bill would revise exemption (b)(4) of the Freedom of Information Act, which currently exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

The prevailing interpretation of the scope and meaning of exemption (b)(4) was stated by the court in National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), which held that commercial or financial information is considered "confidential" and is exempt only if (1) its release is likely to "impair the Government's ability to obtain necessary information in the future," or (2) its disclosure is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." The National Parks test has been widely accepted, although it appears to narrow significantly the scope of subsection (b)(4)

originally intended by Congress.[24/] The proposed amendment to exemption (b)(4) would substitute for the term "confidential" criteria defining this term formulated in National Parks, but would cast these criteria in somewhat broader terms in order to conform the exemption more closely to the original intent of Congress. The amendment would exempt all trade secrets, and would exempt other information obtained from a person if it is privileged or if release "may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future."

This revised standard does not protect all business submissions, but would greatly alleviate the widespread fear among business submitters that the government cannot maintain the confidentiality of sensitive business information. It would require a determination only that release may impair the legitimate commercial or financial interests of a person, rather than a finding that disclosure is likely to cause "substantial competitive harm" to the submitter, as required under the National Parks test. This amendment would make processing of requests simpler by providing a broader and more easily administered standard. It would also greatly relieve the overwhelming burden imposed on the government information system by commercial requesters who believe that the Act can, under present standards, be successfully used as a means of obtaining valuable information about competitors.

Section 7(b) of the bill would also amend exemption (b)(4) to provide expressly that the exemption applies to "any person" and that "financial" interests as well as "competitive" and "business" interests, are protected by the exemption. This proposed amendment would also extend the protection of exemption (b)(4) which is enjoyed by profit-making firms to non-profit submitters, such as universities, hospitals, and scientific researchers. It

would overturn the decision in Washington Research Project, Inc. v. Department of Health, Education & Welfare, 366 F. Supp. 929 (D.D.C. 1973), aff'd in part and rev'd in part, 504 F.2d 239 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975), which held that the exemption currently does not protect valuable information submitted by a non-profit organization.

The bill, in addition, would add "other commercially valuable information" to the categories of information encompassed by the exemption. This amendment would assure the protection of any information that is commercially valuable, whether or not it consists of trade secrets or commercial or financial information concerning the submitter. Thus, for instance, copyrighted materials submitted to the government would be protected from disclosure where this may impair the financial interests of the submitter, regardless of its subject matter. Under current law such materials may not be protected.25/

These revisions to exemption (b)(4), together with the procedural rights for submitters allowed in the proposed amendments to 5 U.S.C. § 552(a)(4), would considerably strengthen the protection against disclosure of commercially valuable information and procurement activities.

C. Personal Information

Section 7(c) of the bill would significantly revise 5 U.S.C. § 552(b)(6), which currently protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." First, the amendment would eliminate the threshold requirement that the information be of the type contained in "personnel and

medical files and similar files" and apply the exemption to the broader category of "records or information concerning individuals." Second, the proposed amendment would broaden the "clearly unwarranted invasion of personal privacy" standard by eliminating the modifier "clearly." Third, the proposed amendment would protect from disclosure lists of names that could be used for commercial solicitation.

The proposed amendment of the threshold language, which would apply the exemption to all "records or information concerning individuals," is intended to overrule decisions that have construed with excessive narrowness the term "similar files." Until recently, the courts construed the term "similar files" broadly to protect all legitimate privacy interests regardless of the nature of the record.[26/] Certain recent decisions have, however, determined that the current exemption in subsection (b)(6) is not applicable, even where disclosure would cause a "clearly unwarranted invasion of privacy," unless the information is also "similar" to medical or personnel files because it is "as highly personal or as intimate in nature--as that at stake in personnel and medical records."[27/] Under this construction of the exemption, a court would not even consider the fundamental question of whether disclosure would cause a clearly unwarranted invasion of privacy unless it first determines that the information is of a type "similar" to medical or personnel files.

This narrow interpretation has resulted in decisions to disclose information concerning individuals that could cause substantial harm to these individuals and whose dissemination clearly violates legitimate privacy interests. See, e.g., Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980) (requiring disclosure of names and biographies of foreign service personnel); Washington Post Co. v. Department of State, 647 F.2d 197 (D.C. Cir. 1981) (per curiam), petition for cert. filed, No. 81-535 (Sept. 15, 1981) (requiring disclosure of information concerning the

suspected United States citizenship of Iranian nationals residing in Iran). The proposed amendment would enable the protection of all personal privacy interests, regardless of the nature of the record at issue.

The proposal would also amend the substantive standard of (b)(6) to allow exemption when disclosure would cause, simply, "an unwarranted invasion of privacy," rather than "a clearly unwarranted invasion of privacy" as provided by present law. To determine whether disclosure causes an "unwarranted" invasion of privacy under the current exemption, the court must weigh the invasion of privacy interests against the public interests in disclosure. The word "clearly" has been construed as an instruction to the court to "tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971). Indeed, the word "clearly" in this exemption has been construed at times as "an imposing barrier to nondisclosure" and as evidence that Congress has weighted the balance "heavily in favor of disclosure." Kurzon v. Department of Health & Human Services, 649 F.2d 65, 67 (1st Cir. 1981).

Deletion of the word "clearly" would enable a more even-handed balancing and a more effective protection of privacy interests. This would conform exemption (b)(6) to exemption (b)(7)(C), which provides "a somewhat broader shield against disclosure than Exemption 6." Congressional News Syndicate v. Department of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977); see Department of Air Force v. Rose, 425 U.S. 352, 379 n.16 (1976). This change is necessary also to assure the protection of privacy which Congress sought to achieve through the Privacy Act of 1974, 5 U.S.C. § 552a. Absent clear and broad protection of privacy in the Freedom of Information Act, the extensive and well-considered protection of personal information which Congress sought to achieve through the Privacy Act is rendered wholly ineffective.

The amendment would, in addition, specifically exempt "compilations of lists of names and addresses that could be used for solicitation purposes." The government currently receives many thousands of requests every year for mailing lists for commercial solicitation purposes. Some decisions have found that such mailing lists may not be withheld under current exemption (b)(6). See, e.g., National Western Insurance Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980); Disabled Officers Association v. Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977). The amendment would make the disclosure of solicitation mailing lists per se an unwarranted invasion of privacy. As the court found in Wine Hobby USA, Inc. v. Internal Revenue Service, 502 F.2d 133, 137 (3rd Cir. 1974), there is no public interest in the disclosure of names for commercial solicitation--such disclosure is "wholly unrelated to the purposes behind the Freedom of Information Act and was never contemplated by Congress in enacting the Act."

Exemption of such lists is also fully consistent with 5 U.S.C. § 552a(n) of the Privacy Act and necessary to make that provision fully effective. Congress expressly mandated in that provision that "[a]n individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law." The Senate Committee Report on the Privacy Act stated that the disclosure of mailing lists by the Federal Government is "totally inconsistent with the purposes of the bill."[28/]

D. Law Enforcement Information

Section 7(d) of the bill would make a series of amendments to exemption (b)(7) of the Freedom of Information Act which, under certain circumstances, exempts investigatory records compiled for law enforcement purposes. The proposed amendments are designed to address three major concerns that have arisen from the present language of exemption (b)(7): (1) the fear among infor-

mants and other confidential sources that their identities will be revealed through Freedom of Information Act disclosures, and the resulting difficulties that law enforcement authorities have encountered in enlisting and using confidential sources; (2) the concern that sensitive law enforcement information will be disclosed to law enforcement suspects by Freedom of Information Act disclosures, thereby hampering law enforcement activities; and (3) the concern that Freedom of Information Act disclosures will reveal law enforcement guidelines and priorities to law enforcement suspects.

1. General Scope of Exemption

Under present law, records are eligible for exemption from the Act under subsection (b)(7) only if they are "investigatory records compiled for law enforcement purposes." Some courts have read this threshold requirement strictly, holding that law enforcement records are not within the scope of exemption (b)(7) if they are not "investigatory" in nature.29/ Section 7(d)(1) of the bill would broaden the scope of exemption (b)(7) by eliminating the requirement that records must be "investigatory" and apply exemption (b)(7) generally to all "records or information" compiled for law enforcement purposes. This language would make additional categories of documents besides "investigatory records" eligible for exemption under (b)(7), such as various types of background information, law enforcement manuals, procedures and guidelines, and statements of law enforcement priorities. This more general threshold language also would properly focus the inquiry not on the nature of the records but on the substantive law enforcement interests which exemption (b)(7) was intended to protect.

2. Interference With Law Enforcement

Section 7(d)(2)(A) of the bill would amend subparagraph (A) of exemption (b)(7) to provide a clear rule that investigatory information relating to ongoing investigations or enforcement proceedings is exempt. At present, subsection (b)(7)(A) protects records from disclosure where disclosure would "interfere with enforcement proceedings." This language was adopted by Congress in 1974 to overrule a series of cases that had held that law enforcement records enjoyed virtually blanket protection from disclosure, even after the termination of the underlying investigation or enforcement proceeding. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 228-30 (1978). Nevertheless, Congress did not intend at the time of the 1974 Amendments to the Freedom of Information Act to permit premature disclosure of investigative information or to allow the targets of law enforcement investigations to use the Act to harass and obstruct an investigation. Id. at 236.

At present, however, subsection (b)(7)(A) does not clearly protect all information pertaining to pending investigations. The present standard has engendered some uncertainty by apparently requiring agencies and courts alike to speculate whether or not disclosure would "interfere with" a pending proceeding. Responding to requests under the current (7)(A) exemption can result in severe disruption of enforcement proceedings, since agencies have frequently been required to create lengthy and detailed affidavits (required under the rule of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)) to justify the determination that disclosure would "interfere with" an ongoing investigation or proceeding.30/

The bill would address these concerns by eliminating the requirement that disclosure must "interfere with" a pending investigation or proceeding and by impos-

ing, in its place, a standard that would permit an agency to withhold records from disclosure whenever disclosure would "reveal investigatory information relating to an ongoing investigation or enforcement proceeding."

As amended, subsection (b)(7)(A) would provide clear protection for sensitive law enforcement investigatory information by simply exempting such information from disclosure while an investigation or enforcement proceeding was ongoing. This new standard would be consistent with recent judicial constructions of the current exemption (7)(A)--"[l]ower courts have consistently held that the government can meet its burden by demonstrating pendency of an ongoing investigation and that the withheld information was clearly related to it." Campbell v. Department of Health & Human Services, 518 F. Supp. 1114, 1115 (D.D.C. 1981).31/ While the proposed amendment of exemption (7)(A) would not, in light of such case law, significantly modify the availability of investigative records, it would make clear that the government could meet its burden of proof through generic Vaughn affidavits. This would greatly alleviate the administrative burdens that can currently be imposed on agencies by requests for information concerning ongoing investigations. Consistent with the intent of Congress in enacting the 1974 amendments to exemption (b)(7), investigatory material would not, however, be exempted under the proposed subsection (b)(7)(A) after the investigation or enforcement proceeding is concluded.

3. Confidential Source Information

Section 7(d)(3) of the bill would make a series of important changes to subparagraph (D) of exemption (b)(7). These proposed changes are intended to clarify and strengthen existing exemptions to make clear that the Act does not require the disclosure of information that would compromise a confidential source that provided information or assistance to agencies or law enforcement authorities.

Exemption (b)(7)(D) presently protects information from disclosure that "would . . . disclose the identity of a confidential source." The proposed amendment would broaden this exemption to include information that would "tend to" disclose the identity of a source. This broadening of the provision is necessary because the release of information that does not itself identify an informant can, in some circumstances, result in such identification. When viewed in context with other information known to a requester, pieces of information obtained through the Act that do not appear revealing on their face may enable a requester to surmise the identity of an informant.

Exemption of information not only where disclosure "would" identify an informant, but also where it would "tend to" do so is generally consistent with the construction of the exemption suggested in the current case law.32/ Moreover, this change would conform the terms of the exemption more closely to the original intent of Congress. The author of the exemption, Senator Hart, stated plainly that:

> [t]he amendment protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure.

120 Cong. Rec. 17,034 (1974).

Section 7(d)(3) of the bill would also amend the language of subparagraph (D) to identify more clearly the range of entities that may be considered "confidential sources." Under present law, there has been uncertainty whether foreign governments and state and local governments or agencies can properly be deemed "sources".33/ Similarly, questions have been raised concerning the applicability of the term "confidential sources" to businesses and other private institutions.34/ The majority of courts, nonetheless, have held that foreign, state, and local governments and agencies, as well as private busi-

nesses, may be "confidential sources" within the meaning of subparagraph (D) of exemption (b)(7).35/ The bill's amendments to subparagraph (D) would confirm this majority rule and would provide a clear statement on the face of the statute that institutional informants are included among the confidential sources protected by the Act, thereby alleviating the concern among some of these institutions that law enforcement information they provide the federal government may be subject to release.

Finally, section 7(d)(3) of the bill would grant greater protection to the information furnished to criminal law enforcement authorities by confidential sources. Currently, subparagraph (D) permits the government to withhold from disclosure "confidential information" furnished "only by a confidential source" in the course of a criminal investigation. These changes would make it clear that all information provided by a confidential source is exempt, by eliminating qualifying terms that create confusion and ambiguity with respect to the scope of the exemption. The present terms of the Act would appear, if read literally, to suggest that "non-confidential" information provided by an informant is not exempt. This is, however, contrary to the apparent intent of Congress.36/ Indeed, any attempt to segregate "confidential" from non-confidential information received from an informant would be impossible since informants could be identified from even very circumstantial information that might appear on its face to be non-confidential.

The apparent requirement that information must be furnished "only" by a confidential source to be exempt would also be eliminated by the bill to prevent the confusion which can result from a restrictive reading of the current exemption. For instance, the lower court in Radowich v. United States Attorney, 501 F. Supp. 284, 288 (D. Md. 1980), determined that the exemption was not applicable unless the information was available "only" from

a confidential source and not available from another source. This was properly reversed by the court of appeals, which found no such congressional intent to restrict the exemption. Radowich v. United States Attorney, No. 81-1068 (4th Cir. Sept. 4, 1981). The proposed amendment would make clear that all information provided by a confidential source is exempt, regardless of whether it might also have been obtained from another source.

4. Disclosure of Law Enforcement Techniques

Section 7(d)(3) of the bill would also amend subsection (b)(7)(E) to grant broader protection from disclosure to records containing law enforcement guidelines and priorities. At present, subparagraph (E) protects from disclosure only those records that would disclose "investigative techniques and procedures." This language has proven insufficient to protect a broad range of sensitive law enforcement materials from disclosure.37/

The bill would expand exemption (b)(7)(E) to protect expressly "guidelines, or priorities for law enforcement investigations or prosecutions," in addition to "techniques" and "procedures". This change, together with the new threshold language for subsection (b)(7) (which eliminates the requirement that exemption (b)(7) applies only to "investigatory records"), would expand the scope of subparagraph (E) to apply to any information revealing techniques, procedures, guidelines or priorities for law enforcement purposes, and not simply to such records disclosing techniques and procedures compiled in the course of an investigation.38/ It should be noted that the revision of subsection (b)(7)(E) is complemented by the proposed amendments to exemption (b)(2), which would exempt all "manuals and instructions" to investigators and others from disclosure.

5. Endangerment of Life or Physical Safety

Section 7(d)(3) of the bill also would expand subparagraph (F) of exemption (b)(7). Paragraph (F) now authorizes the withholding of records where disclosure would endanger the life or physical safety of law enforcement personnel. The bill would replace the words "law enforcement personnel" with the words "natural person", thus extending exemption (b)(7)(F) to include such persons as witnesses and potential witnesses whose personal safety is of central importance to the law enforcement process.

6. Disclosure of Information Relating to Terrorism, Organized Crime, or Foreign Counterintelligence Investigations

Section 7(d)(4) of the bill would add a new subparagraph (G) to exemption (b)(7) that would enable the Attorney General to exempt by regulation or order information relating to investigations of terrorism, organized crime or foreign counterintelligence. A number of law enforcement agencies have found that organized criminal elements, hostile foreign government intelligence agencies, and extremist political groups have attempted to use the Freedom of Information Act to uncover government informants in their midst or to discover information concerning government investigations. Such organizations have the incentive and the resources to use the Act systematically to gather, analyze, and piece together segregated pieces of information obtained from government files. The current application of the Act to such files necessarily presents a significant risk of inadvertant or unknowing disclosure of extremely harmful information. Indeed, acknowledgement of the very existence or non-existence of records relating to particular investigatory activities or designated individuals can provide valuable information to criminal organizations and harm law

enforcement and national security interests. The bill would permit the Attorney General to exempt from the Act investigations of organized crime, foreign counter-intelligence and terrorism.

Those categories of organized crime, foreign counterintelligence and terrorism investigations to be exempted and the periods of time for which they would be exempted would be defined by regulations or orders promulgated by the Attorney General. This procedure would allow the Attorney General to continue to permit access to such files, for example those of a historical nature, where disclosure would not endanger personal safety or impair law enforcement. The Attorney General's authority to exempt such records would extend not only to the law enforcement components of the Department of Justice, but also to other government law enforcement agencies.

E. New Exemptions in 5 U.S.C. § 552(b)

Sections 7(e) through (g) of the bill would add two new exemptions to 5 U.S.C. § 552(b). Sections 7(e) and (f) are technical in nature. Section 7(g) would add the new exemptions, which relate to information generated in connection with the settlement of a legal action and to technical data the export of which is controlled by the federal government.

1. Information Relating to Legal Settlements

Proposed exemption (b)(10) would exempt from disclosure records generated in connection with settlement in a legal action in which the United States is a party or has an interest. Under current law, the United States is at a serious disadvantage in attempting to settle lawsuits. Private parties involved in sensitive settlement negotiations can, and normally will, enter into an

agreement with an opponent that information disclosed during settlement negotiations will be kept confidential. Documents generated under such an agreement by private parties in connection with settlement negotiations thus would not generally be obtainable by a third party without judicial order and would be subject to all the protections offered in such court proceedings by the Federal Rules of Evidence and the Federal Rules of Civil and Criminal Procedure.39/ The United States, however, cannot assure confidential treatment of settlement information because it may be forced to reveal the information in response to a Freedom of Information Act request.40/

The proposed exemption would place the United States on an equal footing with private parties in settlement negotiations by enabling it to promise that information disclosed during those negotiations will not normally be revealed to third parties. This will serve to encourage settlement of lawsuits and to protect the integrity of the settlement process, both important public policies.

2. Critical Technology

New exemption (b)(11), set forth in section 7(g) of the bill, would exempt from disclosure technical data that cannot be exported from the United States without approval, authority or a license from an agency, except that the exemption would not apply if the requester obtained the appropriate approval, authorization or license.

Congress has sought to limit the export of critical technology which might be used for purposes contrary to American interests in the Arms Export Control Act, 22 U.S.C. § 2751, et seq., and the Export Administration Act of 1979, 50 U.S.C. App. § 2404. These laws impose controls on the export of technology which may be used for military purposes.

The proposed new exemption would insure that Congress' intent to control the export of sensitive technology could not be frustrated by a Freedom of Information Act request for information regarding or comprising critical technology subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the technology itself is subject to export restrictions. This change would help effect Congress' desire to limit and control the dissemination and export of critical technology.

IX. SECTION 8 OF THE BILL -- PROPOSED AMENDMENTS RELATING TO REPORTING REQUIREMENTS

Under current 5 U.S.C. § 552(d), each agency is required to submit to the Congress by March 1 of each year a report on its Freedom of Information Act activities during the preceding calendar year. Section 8(a) of the bill would amend the reporting requirement to provide that the report would cover the preceding fiscal, rather than calendar, year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

Sections 8(b) and (c) of the bill conform citations in 5 U.S.C. § 552(d) to provisions of the Freedom of Information Act that would be redesignated by provisions of the bill.

X. SECTION 9 OF THE BILL -- PROPOSED AMENDMENTS RELATING TO DEFINITIONS

A. Definition of "Agency"

Section 9 of the bill retains the definition of "agency" set forth in current 5 U.S.C. § 552(e). The definition is carried forward as 5 U.S.C. § 552(e)(1).

B. Definition of "Submitter"

New 5 U.S.C. § 552(e)(2), contained in section 9 of the bill, defines the term "submitter" as "any person who has submitted to an agency (other than an intelligence agency) trade secrets, commercial or financial information who has submitted to an agency (other than an intelligence agency) trade secrets, commercial or financial information (other than personal financial information), or other commercially valuable information in which the person has a commercial or proprietary interest." This subsection provides a standard definition for the group of persons affected by sections 4 and 5 of the bill, relating to the administrative and judicial rights of submitters of commercial information. The provision generally tracks the language of the bill's revision to exemption (b)(4).

The definition does not, however, include persons who have provided only personal financial information to the government. Some agencies (such as, for instance, the Veterans Administration) routinely receive financial information of a purely personal nature from large numbers of individuals. If all such persons were included in the definition of submitters, the administrative burden of simply providing notice of a request (as required in section 4 of the bill) could, in some circumstances, be enormous. Moreover, this expense would seem entirely unnecessary to protect either the financial or the privacy interests of such individuals, since personally identi-

fiable financial information is exempt from disclosure pursuant to exemption (b)(6). This definition also does not include persons who submit information in which they have no "commercial or proprietary interest", such as informants who submit information to a law enforcement agency concerning another person.

C. Definition of "Requester"

New 5 U.S.C. § 552(e)(3), contained in section 9 of the bill, defines the term "requester" as "a person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a)."

In part, this definition is intended as a mere drafting change in substitution for cumbersome phrases in the present Act, such as "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and "such person making such request" (subsection (a)(4)(C)). However, this definition includes not only the person who makes the request but also any person who causes a request to be made or on whose behalf a request is made.

D. Definition of "United States Person"

New 5 U.S.C. § 552(e)(4), contained in section 9 of the bill, defines the term "United States person". That definition is discussed in connection with the analysis of 5 U.S.C. § 552(a)(3)(A).

E. Definition of "Working Days"

New 5 U.S.C. § 552(e)(5), contained in section 9 of the bill, defines the term "working days" to mean "every day excluding Saturdays, Sundays, and federal legal holidays." This definition is essentially the same as the

language of the present Act, and is intended to place conveniently in one provision of the Act the standard rule for calculating time periods under the Act. This definition is not intended to be a substantive change.

F. Definition of "Record"

New 5 U.S.C. § 552(e)(6), contained in section 9 of the bill, defines the term "record" to make clear that the Act applies to existing documentation in any form, including computer tapes and discs. The limitation to "existing documentation" is intended to make clear that an agency's obligation to disclose information extends only to existing information, and that an agency is not required to create new documents or records in response to a request under the Act.

Although the definition of record includes information stored on computer tapes or discs, it specifically excludes system software. This exclusion is intended to protect the security of agency computer systems. It does not limit the availability of substantive information held in computer form.

The definition of record also makes clear that it is not intended to include those documents created for the personal convenience of any government employee or official.41/ Agency employees and officials often create documents and other materials, like diaries, journals, telephone logs, desk calendars, or personal or research notes, that are not of a public character. Such materials are often nothing more than an extension of an individual's own memory. No purpose of the Freedom of Information Act would be served by their disclosure. Their release would not only threaten a serious incursion on the privacy of the individuals who created them, but would also chill their practices of committing to writing their personal views or ideas even for their own use. In a related context,

Congress recognized that such private materials, when not prepared or used for, or circulated or communicated in, the course of transacting government business, are entitled to be kept confidential. See Presidential Records Act, 44 U.S.C. § 2201(3)(A).

This definition does not attempt a comprehensive analysis of what constitutes an "agency record" for purposes of the Act. Neither section 552 nor the definitions section of the Administrative Procedure Act, 5 U.S.C. § 551, provide a definition of what constitutes an "agency record" in this context, and so the courts have undertaken to give content to the term. The bill does not address the manner in which the courts have applied the term, for example, to documents that originate in the Congress or the courts.

FOOTNOTES

1/ This practice has a well-established analogue in the courts. In order to improve judicial administration, virtually every United States Court of Appeals has adopted a rule providing for the disposition without opinion of cases that do not involve any new points of law, do not create or resolve conflicts within the circuit or with other circuits, and are of no general precedential or jurisprudential value. See D.C. Circuit Rule 13; First Circuit Rule 14; Second Circuit Rule 0.23; Fourth Circuit Rule 18; Fifth Circuit Rule 21; Sixth Circuit Rule 11; Seventh Circuit Rule 35; Eighth Circuit Rule 14; Ninth Circuit Rule 21; Tenth Circuit Rule 17.

2/ E.g., Stone v. Export-Import Bank of the United States, 552 F.2d 132, 136-37 (5th Cir. 1977), cert. denied, 434 U.S. 1012 (1978); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974).

3/ See United States v. Murdock, 548 F.2d 599 (5th Cir. 1977); Murphy v. Federal Bureau of Investigation, 490 F. Supp. 1138, 1143 (D.D.C. 1980); see also United States v. Layton, No. CR 80-0416 (N.D. Cal. August 6, 1981).

4/ See United States v. Brown, 562 F.2d 1144 (9th Cir. 1978); United States v. Wahlin, 384 F. Supp. 43, 47 (W.D. Wis. 1974).

5/ For example, in the 1974 Hearings on the Freedom of Information Act, The New York Times complained of paying fees for copying documents that turned out to be newspaper clippings. See Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 163 (1975).

6/ For example, the Defense Department recently prepared an e tensive course of instruction, part of which it sold overseas for $180,000, yet a requester under the Freedom of Information Act was able to obtain it for merely the cost of duplication.

7/ See, e.g., Sneed v. Bresson, 1 Gov't Disclosure (P-H) ¶79,143 (W.D.N.C. 1979), aff'd, No. 79-1800 (4th Cir. Aug. 4, 1980); Eudey v. Central Intelligence Agency, 478 F. Supp. 1175 (D.D.C. 1979); Lybarger v. Cardwell, 438 F. Supp. 1075 (D. Mass. 1977), aff'd, 577 F.2d 764 (1st Cir. 1978); Burke v. Department of Justice, 432 F. Supp. 251 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977).

8/ Rizzo v. Tyler, 438 F. Supp. 895 (S.D.N.Y. 1977).

9/ Such "nationwide" jurisdiction and service of process of a district court by the court itself is already provided for by statute in other contexts. See, e.g., Interpleader Procedure Statute, 28 U.S.C. § 2361; Sherman Antitrust Act, section 5, 15 U.S.C. § 5.

10/ Joint Committee Print, Senate Judiciary Committee and House Government Operations Committee, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 229 (1975).

11/ Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C. Cir. 1977).

12/ Hayden v. National Security Agency, 608 F.2d 1381, 1388 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

13/ Halperin v. Central Intelligence Agency, 629 F.2d 144, 148 (D.C. Cir. 1980).

14/ See, e.g., Hayden v. National Security Agency, 608 F.2d 1381, 1384 (D.C. Cir. 1979).

15/ In a still-pending case, the district court ordered disclosure of an in camera affidavit but, after a petition for rehearing by the agency, that disclosure order was vacated. Baez v. National Security Agency, Civ. No. 76-1921 (D.D.C. Nov. 2, 1978; July 17, 1980). See also Jaffe v. Central Intelligence Agency, 516 F. Supp. 576 (D.D.C. 1981) (publicly quoting from portions of classified documents and affidavits).

16/ In one case, for example, the district court initially ordered disclosure of classified information but, after reversal by the court of appeals, ultimately determined the information to be exempt. Had the district court not stayed the disclosure order, the government would have been foreclosed from pursuing its ultimately successful appeal. Weberman v. National Security Agency, 490 F. Supp. 9 (S.D.N.Y. 1980) (ordering disclosure), rev'd, No. 80-6155 (2d Cir. Dec. 18, 1980) (unpublished), on remand, No. 77 Civ. 5058 (CLB) (S.D.N.Y. June 5, 1981) (denying disclosure); see also 507 F. Supp. 117 (S.D.N.Y. 1981) (on remand).

17/ See also Exner v. Federal Bureau of Investigation, 542 F.2d 1121, 1123 (9th Cir. 1976).

18/ See, e.g., Department of Air Force v. Rose, 425 U.S. 352, 362-67 (1976); Sladek v. Bensinger, 605 F.2d 899, 901-02 (5th Cir. 1979); Jordan v. Department of Justice, 591 F.2d 753, 767-71 (D.C. Cir. 1978) (en banc); Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 721-31 (D.C. Cir.), vacated and reheard en banc, 591 F.2d 752 (D.C. Cir. 1978) (per curiam), aff'g by an equally divided court Civ. No. 76-27 (D.D.C. June 18, 1976), cert. denied, 441 U.S. 906 (1979).

19/ Senate Committee on the Judiciary, Clarifying & Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

20/ House Committee on Government Operations, Clarifying & Protecting the Right of the Public to Information, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Courts are divided in the relative weight to be given to the two committee reports. See, e.g., Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 723-26 (D.C. Cir.), vacated and reheard en banc, 591 F.2d 752 (D.C. Cir. 1978) (per curiam), aff'g by an equally divided court No. 76-27 (D.D.C. June 18, 1976), cert. denied, 441 U.S. 906 (1979) (court followed House committee report); Tietze v. Richardson, 342 F. Supp. 610, 614-15 (S.D. Tex. 1972) (same); Jordan v. Department of Justice, 591 F.2d 753, 767-69 (D.C. Cir. 1978) (court follows Senate committee report); Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (same).

21/ S. Rep. No. 813, supra, at 2; H.R. Rep. No. 1497, supra, at 7-8. See City of Concord v. Ambrose, 333 F. Supp. 958, 959 (N.D. Cal. 1971).

22/ One court granted a pro se Freedom of Information Act litigant access to all portions of the Drug Enforcement Administration Agents Manual other than those pertaining solely to internal housekeeping matters, Cox v. Department of Justice, 576 F.2d 1302 (8th Cir. 1978), only later to deny to that same pro se litigant the portions of the Federal Bureau of Investigation's Manual of Instruction relating to investigative techniques and procedures. Cox v. Levi, 592 F.2d 460 (8th Cir. 1979). See also Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979) (same pro se litigant denied access to portions of United States Marshals Service Manual describing procedures for transporting prisoners in custody); Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979) (portions of Drug Enforcement Administration Agents Manual concerning DEA's handling of confidential informants and search warrant procedures ordered disclosed); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978) (entire BATF pamphlet concerning raids and searches withheld from disclosure).

23/ Compare Hawkes v. Internal Revenue Service, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines ordered disclosed) with Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717 (D.C. Cir.), vacated and reheard en banc, 591 F.2d 752 (D.C. Cir. 1978) (per curiam), aff'g by an equally divided court Civ. No. 76-27 (D.D.C. June 18, 1976), cert. denied, 441 U.S. 906 (1979) (Federal Energy Administration guidelines for audits of refiners' reports withheld from disclosure).

24/ See House Committee on Government Operations, Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits, H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 16-19, 21 (1978).

25/ See Weisberg v. Department of Justice, Civ. No. 75-1996 (D.D.C. Feb. 9, 1978), aff'd in part, vacated in part on other grounds, 631 F.2d 824 (D.C. Cir. 1980) (lower court ordered disclosure of valuable news photographs copyrighted by a submitter).

26/ See, e.g., Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1178-81 (5th Cir. 1978); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974).

27/ Chicago Board of Trade v. Commodity Futures Trading Commission, 627 F.2d 392, 397-98 (D.C. Cir. 1980); see also Kurzon v. Department of Health & Human Services, 649 F.2d 65 (1st Cir. 1981); Ferri v. Bell, 645 F.2d 1213 (3d Cir. 1981).

28/ Senate Committee on Government Operations, Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information, S. Rep. No. 93-1183, 93d Cong., 2d Sess. 31 (1974).

29/ Cox v. Department of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978); National Mutual Insurance Co. v. Friedman, 451 F. Supp. 736, 746 (D. Md. 1978).

30/ In fact, in one case, the Internal Revenue Service was required to file a 13,000 page affidavit. Kanter v. Internal Revenue Service, 433 F. Supp. 812 (N.D. Ill. 1977), dismissed, 478 F. Supp. 552 (N.D. Ill. 1979).

31/ See also Grabinski v. Internal Revenue Service, 478 F. Supp. 486 (E.D. Mo. 1979); Steinberg v. Internal Revenue Service, 463 F. Supp. 1272 (S.D. Fla. 1979).

32/ See, e.g., Nix v. United States, 572 F.2d 998, 1004 (4th Cir. 1978); Church of Scientology v. Department of Justice, 410 F. Supp. 1297, 1302 (C.D. Cal. 1976), aff'd, 612 F.2d 417 (9th Cir. 1979).

33/ See, e.g., Church of Scientology v. Department of Justice, 612 F.2d 417, 428-31 (9th Cir. 1979) (Wallace, J., dissenting); Founding Church of Scientology v. Miller, 490 F. Supp. 144, 148-49 (D.D.C. 1980).

34/ See, e.g., Ferguson v. Kelly, 455 F. Supp. 324, 326-27 (N.D. Ill. 1978).

35/ See, e.g., Lesar v. Department of Justice, 636 F.2d 472, 489 (D.C. Cir. 1980); Church of Scientology v. Department of Justice, 612 F.2d 417, 420 (9th Cir. 1979); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978).

36/ Senator Hart explained that under his amendment an agency "can provide blanket protection for any information supplied by a confidential source" and that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt." Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong. 1st Sess. 451 (1975).

37/ See Jordan v. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978) (en banc) (internal guidelines and criteria to be considered in the prosecution of certain offenses); Hawkes v. Internal Revenue Service, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1365-66 (N.D. Ohio 1976) (guidelines for bringing tire safety investigations).

38/ See Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979); Cox v. Department of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978).

39/ See, e.g., Fed. R. Evid. 408 and Fed. R. Civ. P. 26(c).

40/ See County of Madison v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981).

41/ See Porter County Chapter of Izaak Walton League of America, Inc. v. Atomic Energy Commission, 380 F. Supp. 630 (N.D. Ind. 1974).

Senator HATCH. Next the subcommittee will hear from Roger Milgrim, a senior partner in the New York City law firm of Milgrim, Thomajan, Jacobs & Lee. He is the author of a leading textbook on trade secrets entitled "Milgrim on Trade Secrets."

We are pleased to have you, Roger, share with us your experiences with the Freedom of Information Act.

I will also explain before you begin that the subcommittee customarily encourages its witnesses to summarize their written testimony in 5 minutes or so. The entirety of all written presentations will be included in the record of our proceedings today. Then, of course, we would like to ask some questions.

We are going to make this a panel; so we would also like to call Mr. Paul Perito, an attorney from the Washington law firm of Perito, Duerk, Carlson & Pinco. Mr. Perito brings with him an extensive background in civil and criminal law enforcement, particularly in the area of drug abuse treatment and education, serving in such capacities as former executive director on the Drug Enforcement Administration Advisory Council and on the House Select Committee on Narcotics Abuse and Control. He is appearing here this morning on behalf of Advanced Health Systems and Raleigh Hills Hospitals.

The subcommittee of course welcomes your experiences under the Freedom of Information Act, Mr. Perito.

We will also next hear from Dr. David Worthen, a board-certified ophthalmologist who prior to August 1980 was professor of ophthalmology at the University of California at San Diego. He has also served on the faculties of the University of Florida and the Harvard Medical School.

Dr. Worthen has served extensively with the Ophthalmic Devices Section of the Food and Drug Administration's Ophthalmic Ear, Nose, and Throat and Dental Devices Advisory Panel. In particular, as chairman of the sessions concerning intraocular lenses, he is particularly qualified to comment about FOIA's impact on development of opthalmic devices.

We are very pleased to have you here, Dr. Worthen. Noting that you are from Provo, Utah, that means an awful lot to me. You are not more welcome than the rest, but deep down I think I am espicially happy to see you.

Dr. WORTHEN. Thank you.

Senator HATCH. The subcommittee next would like to welcome Mr. Jerald Jacobs, appearing here this morning on behalf of the American Intra-Ocular Society and the Intraocular Lens Manufacturers Association.

Mr. Jacobs is an attorney with the Washington law firm of Leighton, Conklin, Lemov, Jacobs, & Buckley, which firm serves as counsel to both organizations and has been involved in their behalf in extensive Freedom of Information Act litigation stemming from attempts by requesters to obtain information from Government agencies that their clients consider trade secrets or confidential business or scientific information.

We will be pleased to hear from you as well, Mr. Jacobs.

We will start with Mr. Milgrim. Please proceed.

STATEMENT OF ROGER MILGRIM, ESQ., SENIOR PARTNER IN THE LAW FIRM OF MILGRIM, THOMAJAN, JACOBS & LEE

Mr. MILGRIM. Thank you, Mr. Chairman.

My prepared statement, which I will summarize, is supportive of corrective legislation for the (b)(4) exemption. I would appreciate it if that statement could be included in the record.

Senator HATCH. All statements, without objection, will be included in the record.

Mr. MILGRIM. Thank you.

I would like to make a few observations about the administration's laudable, comprehensive approach to repairing FOIA to prevent the many current abuses under it. I would like to focus on what I perceive to be a few problems in the administration's bill, but that should not obscure my admiration for the effort, the scholarship, and thoughtfulness that are evident in that bill.

While my major concern relates to the administration's bill's procedural aspects insofar as they impact upon trade secrets and commercial information, it may be handiest if we just run down a few of the items that are a problem, in the order of presentation.

Section (a)(3)(b) encourages each agency to promulgate trade secret and commercial information regulations. I believe that invites an unnecessary proliferation of regulation and expense both to the Government and private parties, and that a short legislative approach at this point can handle the problem, one time and in one place.

I am a little concerned about the practicalities of the notice provision. As currently drafted, the bill calls for 10 days from forwarding of the notice. I do not know about the experience of people here, but I have noticed sometimes the mails are delayed. Since we are dealing with notices across a wide country, I believe the only practical approach is to provide for a time period—perhaps 10 days—from receipt of a certified notice.

The other thing that concerns me—and I believe it was present in the bill that had been previously considered by your committee——

Senator HATCH. I might mention that our bill does solve that notice problem.

Mr. MILGRIM. Yes; coupling the two would be very helpful.

The other sort of missing element that was in your bill and that does not appear to be in the administration's bill is an opportunity for an informal meeting between the regulatory agency and the submitter—the affected party.

In dealing with trade secrets and confidential business information and similar information that may be covered under the administration's bill, it seems to me that the opportunity for dialog to explain the subtleties, the nuances, and the industry practices, is perhaps indispensable to achieve understanding on the agencies' part in order for them to make an informed judgment.

With respect to paragraph B, I am a little concerned about the interpretation of "overriding public interest." We can all agree that in the case of overriding public interest there should be perhaps immediate disclosure. The question is: What guidelines—what instructions—are we going to provide to an agency to determine whether this issue is merely of general public interest or actually

affects health, safety, or security and requires immediate disclosure? I think that merits further thought and inquiry.

I would like to turn to (h), which to me is one of the most troublesome aspects of an otherwise commendable piece of legislation.

It seems profoundly unfair to me to give the requester the absolute choice of home court. If the purpose of this FOIA revision in part, and in meaningful part, is to help achieve submitters' cooperation with Government agencies, this feature is plainly out of step. It is just rather obvious that the submitter will have his records, his employees, his counsel, and the people most familiar with his information who can protect it, if it is appropriate to be protected, at his principal place of business. To give the requester the absolute choice to bring that submitter to a faraway place does not seem right.

I believe there is an oversight in I. The legislation quite properly suggests that the courts use sealed records and incamera procedures, but that does not necessarily do the trick, in my judgment.

I think it should be clarified that until the court decides otherwise, only the requester's attorney or perhaps only an independent court-appointed or court-approved expert be given access to the matter and then only under a strict protective order. That is the customary procedure when issues of trade secrets or confidential business information are involved in private litigation.

I believe the protective procedure was probably contemplated by the drafters of the administration's bill, but technical correction I feel is needed to include it specifically.

I would like to turn to another key—perhaps procedural, perhaps remedial—factor. That is the issue of providing attorney's fees and costs to a prevailing requester but not to a prevailing submitter in what is essentially private litigation. I think that is profoundly unfair and possibly unconstitutional.

Practically, it puts the submitter in the position of playing Russian roulette with all but one of the chambers loaded. Constitutionally, since rights in trade secrets are uniformly recognized by our State courts—which define the scope of property rights—to be property, as drafted this section would put all the costs and risks on the property-owning class and none upon those who are in effect attempting to deprive them of their property through this public proceeding.

This statutory result, unless changed, can only encourage specious requester's suits because they have nothing to lose and can only discourage the voluntary compliance with Government requests for information.

In turning to (b)(4), although I said that I would only comment where I had concerns, I cannot resist applauding the excellent drafting and concurring with your fine suggestion, Mr. Chairman, that consideration be given to enlarging it to include academic research and like information—that is, information entitled to respect and protection.

My final comment relates to section (e)(4). As drafted, this section seems to permit the use of shells, shell corporations or agents, to defeat the obvious intention of the bill. I believe technical revision would be appropriate to overcome this presumably unintended

deficiency, which could allow foreign access quite easily through the use of an interposed corporation or a U.S. person who acts as an agent.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Milgrim.

[The prepared statement of Mr. Milgrim follows:]

Prepared Statement of Roger Milgrim

My name is Roger Milgrim. I am both an attorney with a New York City law firm which specializes in trade secret and related matters, and an adjunct professor of law at New York University School of Law. A book that I wrote in 1967, entitled Trade Secrets, has been annually supplemented. It has been purchased by some 7,000 lawyers, corporations and law libraries and is, I am told, regarded as the standard reference work. It has a 200 page chapter dedicated to Governmental regulatory and related matters, and reports the bulk of FOIA decisions considering the (b)(4) trade secret and confidential information exemption.

In my firm's practice, we regularly represent parties who claim ownership of trade secrets and confidential business information and those who claim that claimed matter is not entitled to such protection. I believe it fair to say, therefore, that in private practice and in academics I am not a spokesman solely for companies claiming ownership of trade secrets and confidential business information or solely for companies seeking information from the Government or elsewhere which others might claim to be a trade secret or confidential business information.

As you all know, FOIA exemption (b)(4) permits agency nondisclosure of information which may be a trade secret or confidential business information. Matter qualifying as a trade secret or confidential business information derives that status from State court decisions. An excellent and near universally adopted definition of trade secrets is provided by section 757 of the 1939 edition of

the Restatement of Torts which defines a trade secret as information, not generally known in the trade, used in business with secrecy safeguards, which lends a competitive advantage. That type of information, which ranges from high technology -- and indeed is currently the principal form of protection for our largest technological asset, computer software -- to confidential business information about customer identity and needs, pricing information, and new product lines. Such information is often the very stuff that makes the difference between an enterprise's being an ordinary or outstanding competitor. To the extent that our country has a dedication to competition as a socially efficient and effective way to promote the general welfare, the law of trade secrets is indeed ideally matched to that goal. And it has been so recognized by the Supreme Court in its 1974 landmark Kewanee decision. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481-493 (1974). The court recognized that "in fact, keeping such items secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise." Id. at 483. Remember, our system regards the encouragement of competition as paramount; trade secret law is inherently procompetitive because it encourages development while leaving all free to independently develop.

The Court, in its Kewanee deliberations, gave great weight to a thoughtful decision by one of our outstanding appellate judges, Judge Henry Friendly, who in a

1971 decision, Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971), involving relative rights of a licensor and licensee after the termination of a license, observed that because all are free to independently develop trade secrets, the law of trade secrets which -- unlike patents -- restricts only those who receive such information in a confidential relationship, is in no way anticompetitive. Judge Friendly also took note of the importance of such principles in fostering technology licensing and the favorable contribution that U.S. licensing revenues make to our balance of payments. In 1971, reliable figures suggested the positive contribution exceeds $1 billion per year. Id. at 226 n.7. Many industry experts I know place that figure at $3 to $4 billion a decade later.

The right to use and disclose such information in confidence or subject to contractual restrictions is, under State law, a property right. See Milgrim, Trade Secrets § 1.01[2]. A comprehensive federal decision posits that disclosure of trade secrets under FOIA would raise profound questions of taking of property without just compensation in violation of the Fifth Amendment, Wearly v. F.T.C., 462 F. Supp. 589 (D. N.J. 1978), opinion favorably reviewed but vacated as not ripe for declaratory judgment, 616 F.2d 662 (3d Cir. 1980), cert. denied, 101 S. Ct. 81 (1981), and just this month Montana's Supreme Court unanimously reached the identical conclusion, finding that State's Constitution and public utility laws could not render public a regulated utility's trade secrets under the Fifth and Fourteenth Amendment to our Constitution. Mountain States Tel. & Tel. Co. v. Dep't of Public Service Regulation (Dkt. 80-448

Sept. 8, 1981). I think the Montana court put its finger on the nub in language revealing its concern that private data submitted to the government not be subject to plunder. In balancing the public's right to know with a company's right to commercial secrecy, the court observed that the purpose of "right-to-know" legislation was "to prevent the elevation of a state czar or oligarchy; it was not designed for, nor will we substitute, the tyranny of a proletariat" and held that disclosure would be strictly limited to the extent necessary for rate making, and no more.

The salient characteristic of the law protecting trade secrets and confidential business information is that while this law affords an advantage to one who uses such information secretly as against persons standing in a special relationship to him, that information is fully subject to independent development by all others.

And it is precisely on this point that, in operation, FOIA and the well developed, uniformly recognized law of trade secrets clash. What basis is there for forcing private parties to disclose trade secrets and confidential business information to the Government which may then disseminate that information in a manner which forfeits protection and property when all third parties are free to develop their own?

As you know, in our regulated economy, companies are increasingly obliged to make substantial, often wholesale disclosures of confidential information. Should the Government become, in essence, a clearing house for exchange of information by reason of disclosure it requires

and subsequent FOIA identification and free access by competitors? I think not and I think arguments proposing such a use of FOIA serve no valid or rational purpose in our free enterprise system. To suggest that, FOIA, which is intended to permit the public interest to scrutinize Government activity, be subverted into an information exchange method -- which must be viewed as a private industrial espionage tool, is to my way of thinking frivolous in the extreme. The fundamental flaw in Professor Stevenson's position is that while FOIA disrobing of submitter's current information lodged with the Government would "efficiently" communicate that information, our courts, our Supreme Court in Kewanee, recognize that disrespect of trade secret rights will, ultimately, discourage future investment in and advancement of competitive technology and business. And, the long-term anticompetitive result that to our courts seems inevitable if private information is not protected is the same result discerned by a careful economic analysis. Your committee has already heard economists' testimony showing that long-term dynamic competition would be badly hurt by the short-term expediency of uncontrolled disclosure of confidential information currently lodged with the government.

Our Government, in the conduct of its affairs, surely would not tolerate a rule that would strip away the Government's numerous interests in confidentiality. Not only are its own private deliberations scrupulously exempted from FOIA disclosure, so are its confidential commercial activities recognized to be in the nature of a trade secret. See Federal Open Market Committee v. Merrill, 99 S. Ct. 2800, 2813-4 (1979), where the Federal

Reserve Board's current directives for its purchase and sale of Government securities were found to be in the nature of private confidential business information, and disclosure would be permitted only if the Government would not be harmed in its market operations. Nor would any person in this room foster sharing, willy nilly, by general publication, our nation's defense and similar security data. Our Court has just upheld lifting the passport -- denying precious citizenship in our country -- of one who took U.S. intelligence information in confidence and, in violation of his agreement not to do so, then divulges it. Muskie v. Agee, 101 S. Ct. ___ (1981). To the members of this Committee I put this notion: a private business's trade secrets and confidential business information are no less vital to its well being in the world of competition than the Government's defense and similar secrets are to it in the world of international relations.

If our Government, rightly, will not take a cavalier attitude toward its own sensitive commercial information, such as the Fed's purchase and sale of Government securities, or its own national security data, how can we ask the business community to bear the burden of unmonitored, unreviewed and alarmingly frequent agency disclosure of highly valued private information?

If our system is right about the desirability of letting competitors compete in the classic way, which is to develop and hold confidential their own technology and business information and profit from it, leaving all others to do the same and independently derive the same or similar information, and if we are also to keep our commitment to proper review of Governmental activity, where do we come

out on the FOIA amendment proposed by Senator Dole? I believe that amendment quite fairly takes into account and balances these possibly competing interests.

First, there is the uniform requirement that if confidential information is sought the party that submitted it will be given prior notice. Then there is an opportunity for that party to make the most sensible kind of presentation, that is a presentation by one with a great deal of sophistication relating to the particulars of an industry, to impart to the Governmental agency the reasons why the confidentiality should be preserved. At the same time, the agency has discretion to disregard such requests if they are frivolous and to give the requester an opportunity to be heard if he choses. Finally, in the event that an agency were to deny a request, a requester has access, in his district, to judicial recourse. There, there would be a preliminary judicial review in camera, which is precisely what courts are accustomed to doing in ordinary private trade secret litigation as well as in numerous other situations, such as reviewing material for which the attorney-client privilege is claimed.

The reason why the amendment is to my way of thinking so valuable is that it will put an end to what has become an unfortunate series of arbitrary FOIA death sentences that some agencies have meted out to private confidential information. Adversely affected parties have already testified to some of the known instances and persuasively suggested that for each cited instance there have been numerous, undetected ones. Once disclosed to a competitor the submitter's information loses its proprietary

and competitive value, and the very essence of our private enterprise system is disserved. Senator Dole's proposed amendment does not assure nondisclosure, but it does provide a uniform, orderly procedure to assure that before disclosure occurs the private party presumably entitled to protection has a reasonable opportunity to protect such information. Simply put, in contrast to the current risks of the death penalty for private business information and technology without a trial or a hearing, the Dole amendment provides clear and orderly procedure to avoid unwarranted capital punishment.

Gentlemen, we are an enterprising and energetic nation. Our courts, after extensive probing and analysis, tell us that private development of information is a big plus in the overall competitive scheme and in our international technology licensing. One of the profoundly unfortunate consequences of indiscriminate FOIA disclosure of trade secrets and confidential business information has been putting such information unfairly into the hands not just of domestic competitors, which is bad enough, but into the hands of a number of foreign enterprises and even Governments.

Events of the past decade underscore that the United States economy is hardly immune to world developments. How can we justify requiring private parties to submit sensitive competitive and technological information to the Government which may then make it available not only to direct competitors here, thereby eroding the competitive mechanism that best drives our economy, but to foreign enterprises and foreign nations, and not necessarily friendly ones?

Senator HATCH. Mr. Perito?

STATEMENT OF PAUL L. PERITO, ESQ., REPRESENTING ADVANCED HEALTH SYSTEMS INC., AND RALEIGH HILLS HOSPITALS

Mr. PERITO. Mr. Chairman, I am appearing here today on behalf of a client of the firm, Raleigh Hills Hospitals and Advanced Health Systems.

You undoubtedly, Mr. Chairman, are familiar with the laudatory work being done by Raleigh Hills Hospitals, located in many Western States including Utah, in the area of alcohol treatment. Advanced Health Systems is a corporate entity with a broader umbrella encompassing multiphasic health service delivery.

It is in that capacity that I, as a trial lawyer, was retained and became involved in a series of administrative pieces of litigation that caused our firm to take a very strong position on behalf of our client in favor of the continued viability of the Freedom of Information Act.

We agree very much with Mr. Rose's statement that the act ought to be revisited; and we commend you, Mr. Chairman, for the excellent remedial approaches suggested in S. 1730. However, we have some strong reservations about certain language in the proposed administration bill that I will touch upon.

In light of the limited timeframe, I would ask that my entire statement be included in the record; and I will simply summarize salient portions of my statement and then respond to any questions you may have.

Insofar as any questions you may have about my law enforcement background and related professional experiences in that area, and also unrelated trial experiences, obviously, Mr. Chairman, those are my views and not those of either my client or my law firm.

Senator HATCH. I understand. Without objection, your statement will be included in the record.

Mr. PERITO. Mr. Chairman, our involvement with what occurred with our client is perhaps the most poignant example of why attempting to draw a delineation that the Department of Justice has suggested of precluding the use of FOIA during administrative proceedings would result in terrific inequities and would deprive third parties, corporate individuals, as well as private individuals, of the very underlying purposes to which the act was directed in 1966 and the amendments were added in 1974.

When we became involved in the Raleigh Hills Hospitals HHS reviews there was an ongoing investigation within six offices and agencies in HHS. The primary lead agency was the National Center for Health Care Technology. Its alleged role was to do an efficacy evaluation of a treatment system involving comparative costs for the treatment of the disease of alcoholism.

As it developed, the purpose of the inquiry was to preclude reimbursement to medicare patients who chose the multimodality system offered by Raleigh Hills and chemical aversion therapy, which is an approach to the treatment of alcoholism that has been proven—and I believe there are ample scientific data to support this—perhaps one of the most efficacious systems of health care

intervention in an area where we do not have a definitive answer for the treatment of the disease of alcoholism.

I was faced with a very pragmatic problem as a trial lawyer. There was no proceeding formally pending under the APA insofar as an adjudicatory inquiry was concerned. There was no formal rulemaking with the usual protections of notice and comment. Yet my client's rights were being adjudicated, nonetheless.

You might say, Senator, why did I not go into Federal district court and seek a temporary restraining order or a preliminary injunction? The reason I did not—and I considered that route—is that I would have been precluded, one, because there was not an exhaustion of administrative remedies, which there could not be until a final decision was made; and, two, had I gone into court, I would have been faced with that which trial lawyers fear—namely, a nonripe, nonjusticiability argument by the Government in that the controversy had not ripened into an adjudicatory form so that it was a judiciable controversy.

The only avenue that I had, as a trial lawyer, available to me was to ferret out what was happening on behalf of my client and thousands of patients throughout the United States through the use of FOIA as an appropriate discovery tool.

Yet the Government creatively thwarted attempts by spuriously invoking the (b)(5) exemption in that the alleged proceedings were under consideration and "predecisional"—the word used in several of the cases.

The FOIA provided the only difference between discovering what, in fact, was happening; and what was happening was that the entire governmental inquiry, as we ultimately ferreted out, had started on the basis of erroneous factual and scientific assumptions wherein my client's rights would be adjudicated without any participation by my client in the process. The one difference was, we believe, the creative use of the FOIA for the purpose intended by Congress.

Fortunately, my client could afford the luxury of creative intervention through FOIA. Others out there cannot.

In the desire and zeal of the administration—which we applaud—to revisit the act, I trust that this committee will not allow its emasculation through revisitation.

My deep concern is, if you talk in terms, as the administration does in its bill, of precluding the use of the FOIA during the pendency of an administrative and/or judicial proceeding, what do you mean by those terms?

Does that mean that the agency, simply by going forward with informal rulemaking or an adjudication, can preclude the use of the FOIA? There are several instances, which we found, where the only alternative to finding out what the Government was about—which was infamy—was the use of the FOIA.

So I strongly recommend, Mr. Chairman, to this subcommittee that in reviewing the (b)(5) exemptions, particularly those suggested by the administration, the question you put to Mr. Rose be considered in a nondramatic and thoughtful fashion. You might, by adopting the administration's proposals without modification, preclude the type of discovery which took place here, which led ultimately to a favorable result and the saving of perhaps a full 40

years of treatment efficacy in the delivery of health services to medicare patients who had no other alternative but to seek that type of reimbursement for their treatment for the disease of alcoholism.

I would say, Mr. Chairman, that your bill addresses several of the concerns which I, as a litigator, have had with the act. The act has to be revisited, not emasculated as suggested in the administration's bill.

I would be happy to respond to any questions that you may have in this or other areas. I do not think that I need burden the committee with our specific proposals which I have addressed in my lengthy presentation. We will supplement that presentation, since we now have the administration's bill, so the committee can have consideration of our comments on that bill, in addition to your most recent bill, S. 1730.

One final comment: Perhaps one of the most misunderstood uses of FOIA by the business community is not necessarily in the area of so-called competitive advantage. It is in the area of health care; it is in the area of affirmative action and inquiries relating thereto; it is in many areas where the Government is involved with contracting with private parties where the procedural protections have been flawed by irresponsible or substantive violations of due process rights of people dealing with the Government.

In those areas it is critical that the FOIA continue to be a viable instrument of discovery, because there are several instances—one of which I have pointed out in the proceedings that I have been involved with and other proceedings I have been involved with—in the contract area where to preclude the use of the FOIA during a pending Government administrative proceeding or something similar thereto would preclude the type of discovery which was the very intent of this Congress and I know to which you, Senator, are deeply committed—namely, to ferret out Government waste, fraud, and wrongdoing.

Senator HATCH. Thank you, Mr. Perito. We appreciate your written statement and of course the excellent remarks you have made today, as we have all witnessed.

[The prepared statement of Mr. Perito follows:]

PREPARED STATEMENT OF PAUL L. PERITO

Mr. Chairman, Members of the Subcommittee:

It is an honor to be requested to testify before your distiguished Subcommittee on a subject of great significance -- the potential restructuring of the Freedom of Information Act. I am appearing here this morning on behalf of our clients, Advanced Health Systems, Inc. and Raleigh Hills Hospitals. I am a practicing trial lawyer who is a member of a Washington law firm and in such capacity represent both Advanced Health Systems and Raleigh Hills Hospitals.

I sincerely appreciate the opportunity which you, Mr. Chairman and members of your Subcommittee and competent staff, have afforded us in allowing for an expression of our views on this critical subject. In short, our purpose for appearing here today is to share with you our experiences under the Freedom of Information Act. We respectfully submit that our experiences amply demonstrate that a strong and viable FOIA (perhaps with certain needed modifications) is absolutely essential for corporate and/or individual persons who deal with the government on a continuing basis.

I. BACKGROUND

A. Advanced Health Systems, Inc., and the Raleigh Hills Hospitals.

Advanced Health Systems, Inc. (AHS) is the fastest growing consolidated subsidiary of Petrolane, Inc., a corporation which is listed on the New York Stock Exchange and which is one of the 500 largest U.S. corporations. AHS's corporate offices are located in Irvine, California.

AHS is a specialized health care provider, management and service company. Its activities are organized into three major operating groups: 1) Health Services, 2) Health Care

Technology and 3) Managed Facilities. The Raleigh Hills Hospital Division is the largest of the AHS Health Services Group. It owns and operates 20 short-term, acute care urban hospitals, primarily in the Western United States, which specialize in the treatment of alcoholism. As the result of a recent expansion of the Raleigh Hills Hospitals network, AHS became the largest single private provider of inpatient hospital treatment for alcoholism in the United States.

B. Chemical Aversion Therapy, With Emetine, As An Aspect of Raleigh Hills Hospital Alcoholism Treatment Program.

Raleigh Hills Hospitals employs a 19-step alcoholism treatment program. One of these 19 steps consists of conditioned aversion therapy using emetine as the chemical conditioning agent.[1/] Emetine is used solely as a conditioning agent to induce nausea and vomiting in order to associate those unpleasant phenomena with alcohol consumption. It is this single aspect of the entire multi-modality Raleigh Hills Hospitals treatment regimen for alcoholism that drew the attention of the Federal Government, specifically the Department of Health and Human Services (HHS).

By way of background, chemical aversion therapy, with emetine, in the treatment of alcoholism uses a learning paradigm known in the psychological vernacular as respondent conditioning. Ivan Pavlov, a Noble Laureate and Professor of Physiology in

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1/ In addition to chemical aversion therapy the following other modalities constitute the comprehensive multi-modality alcoholism program: (1) detoxification; (2) medical treatment of organic complications; (3) individual alcoholism counseling; (4) group alcoholism counseling; (5) family counseling; (6) individual education regarding alcoholism and complications; (7) daily medical evaluation; (8) psychological evaluations; (9) relaxation training; (10) bio-feedback training for symptom control; (11) goal planning; (12) assertiveness training; (13) roleplaying , rehearsal; (14) systematic sensitization; (15) identification of psychological illness; (16) depression treatment; (17) nutritional counseling; and (18) aftercare planning and counseling, which includes an introduction to Alcoholics Anonymous (AA) and lifetime aftercare therapy as long as the patient remains sober.

the Military Medical Academy of St. Petersburg, reported on a variety of experiments between 1895 and 1924 which established the laws of respondent conditioning. His most famous experiment showed that repeatedly pairing a neutral stimulus with a stimulus that elicited salivation ultimately enabled the neutral stimulus itself to elicit salivation. In this research, Pavlov was simply revealing one of the most influential modes by which animals and humans acquire new response patterns in the face of changed environmental circumstances.

As one aspect of the Raleigh Hills alcoholism treatment program, an originally neutral stimulus, beverage alcohol, is repeatedly paired with a stimulus, emetine, eliciting vomiting and nausea. This repeated pairing is necessary so that the neutral stimulus, beverage alcohol, itself acquires the nausea inducing properties of the emetine; when it does so, alcohol is then an aversive agent, one which the patient chooses to avoid ingesting.

C. The HEW (HHS) Investigation of the Raleigh Hills Hospitals Program.

Starting in 1975, certain officials within the Department of Health, Education and Welfare (now Health and Human Services) began an examination of the Raleigh Hills Hospitals alcoholism treatment program. This examination was a secret directed inquiry, as opposed to the represented inquiry involving broad issues of coverage for all alcoholism treatment programs. It was targeted specifically against Raleigh Hills Hospitals due to the use of emetine as an aversive conditioning agent.

Without the use of the Freedom of Information Act, which constitutes the focus of your Congressional examination today, a most effective treatment method for chronic alcoholism might well have been irreparably and permanently harmed, and certainly professionally discredited by what appears to have been a cavalier and highly unprofessional government financed investi-

gation conducted by certain unfortunately prejudiced and myopic federal bureaucrats. Based upon the facts which I will set forth in my testimony today, AHS and RHH respectfully recommend to this Honorable Subcommittee that it not seriously entertain any proposals which would weaken the responsible use of this most powerful and essential tool as a truthseeking device for ferreting out the discovery of secret and arbitrary administrative actions by government against persons -- be they corporate or private individuals.

II. INFORMATION ACQUIRED BY ADVANCED HEALTH SYSTEMS, INC. AND RALEIGH HILLS HOSPITALS THROUGH USE OF THE FOIA

Medicare coverage has been continuously extended to the services provided by Raleigh Hills Hospitals since 1966, soon after the adoption of the Medicare program in 1965. It is in this connection, as a Medicare provider, that the safety and efficacy of chemical aversion therapy, using emetine, arose as an issue within the Department of Health and Human Services (HHS).

Our law firm was retained in early 1980 to represent both Raleigh Hills Hospitals and Advanced Health Systems, Inc. in connection with an ongoing investigative proceeding involvi the Medicare coverage of the Raleigh Hills Hospitals' treatmen program for patients undergoing treatment for the disease of alcoholism. Although we assiduously endeavored to secure information regarding this rather unorthodox investigation directly from government officials involved, we found that their writter and oral responses left us with no alternative but to pursu discovery through the Freedom of Information Act since no viable alternative then existed, short of actual litigation. Consequently, early in our representation of the client, we file multiple Freedom of Information Act requests with various HH

constituent agencies. Our reason for resorting to Freedom of Information Act as a discovery tool was that our client, as well as our law firm, was confronted by the reality that we could not secure through traditional channels any information regarding the nature of the inquiry and the very existence of the then-protracted inquiry was having an adverse and dilatory impact not only upon patients and staff, but upon potential recipients of treatment since government officials informally were advising third parties that the treatment delivery system was of a questionable scientific and/or medical efficacy.

The information discovered by the Freedom of Information Act requests was startling. Although every conceivable delaying tactic was used by several of the government agencies to preclude us from securing information that we had a statutory right to secure, we finally were able to piece together a most alarming and consistent pattern of government abuse. Much to our amazement, we learned that the rights of Raleigh Hills Hospitals and Advanced Health Systems had been grossly violated through what appeared to be a furtive, prejudiced and pre-determined investigation of nearly five years' standing targeted solely at AHS and RHH by several officials within HHS. Although the investigation was clothed under an alleged inquiry into alcoholism treatment systems and, in particular, chemical aversion therapy, with emetine, it was, as the multiple documents revealed, a frontal assault upon Raleigh Hills Hospitals and an attempt by certain officials to bring them to their fiscal knees and ultimately to preclude reimbursement under Medicare. These officials clearly knew that a removal of Medicare coverage, although insubstantial in terms of the totality of the cash flow of the corporation, would arouse the spectre of questionable efficacy for the delivery system and thereby potentially cause other third party payors, i.e., the insurance companies, to fol-

low the government's lead, thereby adversely affecting the fiscal viability of the Raleigh Hills Hospitals and Advanced Health Systems multi-modality service delivery system for the treatment of alcoholism. What was perhaps even more startling was our discovery that no other provider of a similar service was involved in the inquiry and the key government officials who conducted such inquiry had never bothered to ask questions of the entities being investigated. Rather, the government bureaucrats conducting the investigations consistently refused to visit facilities or enter into a dialogue with the medical and scientific expert at the Raleigh Hills Hospitals and Advanced Health Systems facilities for a purpose which became quite obvious as our inquiry continued -- certain government officials wanted no facts or information which would allow for a disinterested and scientifically responsible decision.

In our judgment, not only did this investigation violate the Administrative Procedures Act, but it also contained several elements of substantive and procedural due process violations guaranteed to our clients under the Fifth Amendment to the Constitution of the United States. We were greatly disturbed to see emerging a pattern of prejudgment emanating from government officials, especially since such activity was not occurring within the context of a bona fide criminal investigation for fraud but rather was appearing under the innocuous banner of an alleged inquiry to determine the efficacy, both scientifically and fiscally,of an alcohol treatment delivery system. One would think that if in fact the government was conducting an efficacy inquiry, there would be some basis of comparison with other systems or there would be an attempt to seek out all of the facts from the principal provider of the system in order to determine whether those facts proffered by the provider and those facts ascertained by the government

investigators were parallel or dissimilar. Had we not been sufficiently aggressive in pursuing our clients' statutory rights under the FOIA, there is little question that we would have been ultimately faced with a preordained adverse government decision wherein we would have found ourselves litigating in a federal district court and attempting to convince a federal district court judge that the inquiry in which we allegedly participated (and as evidence from our testimony our participation was tragically limited) resulted in a finding which was both arbitrary and capricious. Such an onerous evidentiary standard becomes far more difficult, as any experienced litigator knows, when dealing with a complex scientific and medical subject over which the experts have never totally agreed. The documents ultimately produced through FOIA, notwithstanding the multiple deletions made under some spurious reasoning by certain HHS officials, lead us to the inescapable conclusion that a pre-ordained, negative result was being set in motion by certain officials within HHS intent upon denying Raleigh Hills Hospitals' patients a professional,competent and responsible medical service which they desired and which they could not afford but for Medicare coverage. Fortunately, the viability of the FOIA and our ability to use such an instrument in a creative and responsible fashion gave us the opportunity to turn a Constitutionally infirm inquiry into an ultimate resolve which was both fair to our clients and scientifically responsible in terms of the public interest.

A. The First Evaluation of the Raleigh Hills Program: 1975-7

Emanating from a dozen Freedom of Information Act (FOIA) request letters was a vivid scenario of two rounds of evaluation by HHS of the chemical aversion aspect of the Raleigh

Hills treatment regimen.[2/] The first evaluation period began in late 1975 when the Denver, Colorado regional representative of the Social Security Administration's Bureau of Health Insurance (BHI) requested guidance as to Medicare reimbursement for alcohol rehabilitation. This request for assistance was noted in the context that "we have a provider in this region, Raleigh Hills Hospitals - Salt Lake City, which has very high charges for the treatment." This initial concern with the Raleigh Hills Hospitals program thus centered not around the safety or efficacy of chemical aversion therapy, but on the cost of providing such treatment.

By February 13, 1976, officials with BHI headquarters in Baltimore stated that aversion therapy in the treatment of alcoholism was a specific concern of the Bureau and that consultation with the Public Health Service (PHS) regarding this treatment modality was indicated. Yet, although other facilities provide chemical aversion therapy, all inquiries by BHI and other branches of PHS were directed solely at the Raleigh Hills Hospitals program. A meeting was convened on March 31, 1976 by representatives of the hierarchy superior to BHI within the Social Security Administration, the Division of Provider and Medical Services Policy (DPMSP), to discuss policies regarding coverage of treatment offered by Raleigh Hills Hospitals.

It was obvious from the documentary evidence that we acquired through the FOIA that there was some internal disagreement at BHI pertaining to the approach which should be adopted with respect to the assessment of coverage policy. BHI regional

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2/ This Statement of Facts acquired through the use of the FOIA is in an abbreviated, summary form. A more complete, detailed and fully documented report entitled "Memorandum for the Secretary on Behalf of Raleigh Hills Hospital With Regard to the Department's Inquiry Concerning Raleigh Hills Hospitals and Chemical Aversion Therapy, with Emetine, In the Treatment of Alcoholism" (October 29, 1980) has been given to the Subcommittee and may be examined at its office. Moreover, the Subcommittee has copies of our FOIA requests and appeals, and agency responses thereto.

representatives drafted a proposed set of guidelines limiting coverage for aversion therapy. These guidelines were not approved at Social Security headquarters since the question of coverage was then under consideration within the Social Security Administration (SSA) and any decision would depend heavily on the result of an efficacy study, which, at that time, was to be conducted by the Bureau of Quality Assurance (BQA). Several regional representatives felt that the question of Medicare coverage for the treatment of alcoholism was not a regional question that specifically applied only to the Raleigh Hills Hospitals treatment program but was, instead, a national question involving a lack of comprehensive SSA policy towards Medicare coverage of various types of alcoholism treatment programs.

A draft of the initial version of the PHS report on the efficacy of aversion therapy for alcohol dated June 29, 1977 was prepared for the signature of a person who had already left PHS. A revised version of the report was issued on December 27, 1977 by William B. Munier, M.D., Director of Office and Health Practice Assessment (OHPA), the office in PHS which had taken over responsibility for Medicare coverage recommendations from the Bureau of Quality Assurance.[3/]

In his report, Dr. Munier stated that evidence regarding the efficacy of aversion therapy for alcoholism was inconclusive and pointed out, in reference to safety, that the Food and Drug Administration (FDA) had not ruled on the use of emetine in the treatment of alcoholism. He concluded by recom-

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3/ The current PHS unit providing Medicare coverage recommendations is the National Center for Health Care Technology (Center) which was established by Congress in 1978 under the Health Services, Health Statistics and Health Care Technology Act of 1978, Pub. L. No. 95-623, 92 Stat. 3443 (1978), 42 U.S.C. § 242n.

mending against coverage, based upon the lack, he asserted, of well-controlled double blind studies.

Other HHS officials concurred with the PHS recommendations. Helen L. Smits, M.D., Director, Health Standards and Quality Bureau, HCFA, not only agreed with the PHS recommmendation, but directed a review into continued certification of Raleigh Hills Hospitals. A copy of the PHS memo was also sent to Richard Marcus, Ph.D, Biomedical Research Branch, National Institute of Alcohol Abuse and Alcoholism (NIAAA), for his review. He agreed with the recommendation against coverage citing an alleged lack of definitive evidence of efficacy of chemical aversion treatment and the "potentially disastrous combination" of emetine, ephedrine and pilocarpine. Adding a new spectre of HHS suspicion of the Raleigh Hills Hospital operations, Dr. Marcus also stated that "safety aspects are frequently overlooked (or perhaps covered up) in published reports in efficacy claims."

When Herbert H. Pratt, President of Raleigh Hills Hospitals, was notified by letter dated August 1, 1978, from Medicare officials that chemical aversion therapy was to be excluded from coverage by Medicare since it could not be considered to be "reasonable and necessary" for the treatment of illness or injury, he sought a meeting with HHS officials. That meeting occurred on August 18, 1978.

On September 11, 1978 William D. Fullerton, then the Deputy Administrator, HCFA, reversed the position taken earlier by HHS based upon the first evaluation and informed Raleigh Hills Hospitals that Medicare coverage for chemical aversion therapy would continue "unless and until it is determined in connection with the procedures attendant upon rulemaking that this therapy is not medically effective." He also stated that HCFA would follow an "informal rulemaking proceeding" on the subject of the efficacy of chemical aversion therapy to "provide you and

the public generally with an opportunity to participate in the development of our policies on this issue, and ... assist us in developing a comprehensive record on which our ultimate decision will be based."

From this initial evaluation, several conclusions about the conduct of these federal officials may be derived. It appears that a number of HHS officials targeted, without sufficient facts, the Raleigh Hills Hospitals' alcohol treatment program as allegedly being too costly. Although these officials had refused to enter into meaningful discussions with officials at Raleigh Hills Hospitals, these officials concluded that since the program was too costly, the treatment entailed in such program should not be eligible for Medicare coverage.

B. The Second Evaluation of the Raleigh Hills Hospital Program: 1978-1981.

On September 21, 1978, the Assistant Secretary for Health and Surgeon General, Julius B. Richmond, M.D., directed the Administrator of ADAMHA and the Commissioner of FDA to furnish him with "a joint written recommendation as to the safety and efficacy of this form of therapy." Officials in ADAMHA and FDA later determined that ADAMHA would handle the efficacy issues and FDA would review the safety issues.

On October 20, 1980 the Acting Director of NIAAA submitted a proposed plan of evaluation to the ADAMHA Administrator. He suggested that a panel of 6 to 8 consultants be convened to consider all forms of chemical aversion therapy for alcoholism treatment. The panel was to survey and review existing scientific literature regarding such treatment and to invite interested parties to submit additional data for the panel's consideration. He also noted that a working group had been established within HHS which included many of the same officials who had prepared the first evaluation report on chemical aversion therapy in the treatment of alcoholism.

Specifically, he proposed that Dr. Marcus serve as Executive Secretary for the panel. This document contains a typing reference that indicated that the plan was drafted by Dr. Marcus.

At this time, there was also an exchange of correspondence between Mr. Pratt of Raleigh Hills Hospitals and Dr. Munier of PHS. Dr. Munier expanded the scope of the evaluation from being purely on relative efficacy to four coverage criteria: safety, efficacy, stage of development and acceptance by the medical community. As to evaluation of safety and efficacy criteria, Dr. Munier imposed a higher scientific standard of proof for chemical aversion therapy than had been noted by Mr. Fullerton of HCFA in his decision of September 11, 1980. Throughout the entire evaluation process, the standard of evaluation used varied from person to person within HHS.

Through one of our FOIA requests, we came across an incredible set of memoranda from Dr. Smits, formerly the Director of the Health Standards and Quality Bureau of HCFA, to Seymour M. Perry, M.D., Acting Director of the National Center for Health Care Technology (Center). On February 26, 1979, she asked for his assistance in expediting the preparation of the Safety and Efficacy Report. She stated:

> As you know, OGC (Office of General Counsel) has told us we must publish our intent to rescind coverage for this treatment. We need a tightly researched and reasoned paper to proceed. This paper is long overdue and we would appreciate your help in expediting this issue.

Dr. Smits expressed a similar predisposition to terminate coverage in a May 4, 1979 memorandum to Dr. Perry concerning the August 1978 meeting between agency officials and Raleigh Hills representatives:

> In discussing the matter following the meeting, HCFA General Counsel advised us that we are obligated to publish a withdrawal of benefits before we exclude this form of treatment from the program. In view of the questions regarding the adequacy of the Public Health Service document, it was agreed that any new evidence would be considered and that a new document would be prepared....

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If the FDA/ADAMHA group does not reverse their original position, the document will become the center of some controversy. I think it would be helpful, therefore, if the names of experts consulted were included in your report.

I remain concerned about the use of drugs in this program which have not been approved by the FDA for the treatment of alcoholism. I am most anxious to see the matter resolved.

Dr. Krauthammer, formerly of ADAMHA, contacted John R. DeLuca, NIAAA Director, asking him to prepare a plan of the procedures to be used in the efficacy analysis of aversion therapy. Mr. DeLuca proposed to convene a workshop of experts in the field to survey and review "... all the available evidence, including scientific literature and submitted materials, with respect to the efficacy of (chemical aversion therapy) in the treatment of alcoholism as it is used today, with special consideration given to the Raleigh Hills regimen." He further suggested that interested parties be identified and invited to submit additional data for the panel's consideration.[4/]

To carry out its directive to evaluate the efficacy of chemical aversion therapy in the treatment of alcoholism, NIAAA convened a panel of consultants. The five panel members were:

Joseph V. Brady, Ph.D. (Chairman)
Department of Psychiatry & Behavioral Science
Johns Hopkins University School of Medicine
Ralph L. Elkins, Ph.D.,
Coordinator, Psychology Research
Augusta, Georgia
Veterans Administration Medical Center

Richard Fullers, M.D.,
Cleveland, Ohio
Veterans Administration Medical Center

Edward Gottheil, M.D., Ph.D.,
Professor of Psychiatry and Human Behavior
Jefferson Medical College (Philadelphia)

Ira A. Liebson, M.D.
Baltimore City Hospitals.

4/ None of the documents received by Raleigh Hills pursuant to the Freedom of Information Act give any indication that the Center or NIAAA has solicited or received data from providers of this or any other alcoholism treatment therapy other than Raleigh Hills Hospitals.

The NIAAA expert panel met in Bethesda, Maryland on January 10, 1980 without any public notice having been published. Dr. Marcus, the Executive Secretary, prior to the meeting had asked the panel members to prepare and circulate to each other written reports "based on the materials" sent to them by Dr. Marcus. The panels "charge" was "to evaluate the use of chemical aversion therapy for the treatment of alcoholism". The evaluation was to be based upon, in part, "data supplied by Raleigh Hills...."

The report of the panel was to be submitted to PHS by January 16, 1980, just six days after the Bethesda meeting. The panel members could amend their previously written opinions at the meeting. Based upon these opinions and a tape recording of the meeting, Dr. Marcus would "then prepare a written document summarizing the panel's recommendations which would then be provided to you for final review and comment prior to formal submission to PHS."[5/]

The NIAAA expert panel report prepared by Dr. Marcus was entitled "Chemical Aversion Therapy for Alcoholism: Evaluation of Efficacy." It was transmitted by the Director, NIAAA, to the Administrator, ADAMHA, during the third week of January 1980. The NIAAA report, however, was not transmitted by ADAMHA to Dr. Perry, the Center's Director, until April 1, 1980. Evidently, transmitting the NIAAA report to the Center was a bureau-

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5/ Dr. Brady, the Chairman, who is a respected professor at Johns Hopkins University, prepared a written opinion on chemical aversion therapy concluding that such treatment is acceptably efficacious. He also raised the question of why the issue of chemical aversion therapy was ever addressed in the first place:

> There would seem to be every indication of discriminatory action in the process whereby this particular treatment modality was singled out for scrutiny to the virtual exclusion of a wide range of accepted and routine medical and behavioral interventions for which there is even less scientific evidence of efficacy. Perhaps the issue here is not efficacy at all, but rather something more like topography. (Emphasis added.)

cratic mistake. Peter Kramer, M.D., of ADAMHA's Division of Science, in a May 13, 1980 memorandum to O.B. Towery, M.D., of the Center, characterized the April 1 NIAAA Panel report April 1, as an "earlier draft" that "should not have been forwarded to you at all." Yet, quizically, Dr. Kramer refers to the April 1 NIAAA expert panel report as identical to a revised report transmitted to the Center on April 9, 1980.

From the documents which we have acquired through the FOIA, it is obvious that Dr. Kramer, for the period from January through March, was actively engaged in rewriting the expert panel's report. Some of Dr. Kramer's comments regarded the form of the NIAAA expert panel report; however, other revisions by Dr. Kramer proposed significant and legally substantive changes.

For example, on January 30, 1980, Dr. Kramer met with Ms. Laura Rosenthal of NIAAA. A followup memorandum to her ordered revisions in the expert panel's report covering approximately six pages. Most of Dr. Kramer's revisions were, in fact, implemented. Some of his revisions, however, were not, because, according to G.C. Salmoiraghi, M.D., Ph.D., the distinguished Associate Director for Research, NIAAA, "it would appear imprudent at this point for NIAAA to undertake such modifications of the documents which have been reviewed by the consultant panel and officially transmitted through channels to ADAMHA...." The revised Kramer report - not the original NIAAA expert panel report - was transmitted to the NIAAA Director on March 18, 1980 by Dr. Salmoiraghi, with a notation that it was revised "in accordance with suggestions made in Dr. Kramer's memorandum or statements made by Dr. Klerman (Gerald L. Klerman, M.D., Administrator, ADAMHA)." The next day, the NIAAA director transmitted only the Kramer report to Dr. Klerman. This time, however, it was accompanied only with the terse note that it was revised "in accordance with comments made by you and by Dr. Kramer in his memorandum."

Dr. Kramer, in turn, transmitted the revised report to Dr. Klerman noting cryptically that "there are ... many bruised egos and ... much bad feeling (in NIAAA) about this report...," and that "(t)he report has been largely revised according to our recommendations, and I think we will have to live with the few sentences we don't like." (Emphasis added.) It is in this manner that the report of the NIAAA expert panel, which was very favorable to Raleigh Hills Hospitals and chemical aversion therapy, with emetine, in the treatment of alcoholism, was seriously undermined by the Kramer report.

The most damaging comment made by Dr. Kramer was that the last sentence of the conclusion section should have been stated in terms of "possibly or probably effective." The implication is that Dr. Kramer intended to weaken or modify the scientific judgment of the expert panel as to safety and efficacy. Dr. Kramer, whose suggestions were followed in the revised report, also objected to the unanimous opinion expressed by the expert panel that chemical aversion therapy "should continue to be available to the alcoholic patient." This unanimous conclusion of the expert panel is at odds with Drs. Kramer and Marcus' insistence that this therapy is only "probably effective."

It also is evident from the comments contained in related documents that NIAAA expert panel members believed that Medicare coverage should continue to be extended to chemical aversion therapy. Dr. Kramer ordered such references to be deleted on the ground that "reimbursability" was not within the panel's "charge." As Kenneth Warren, Ph.D., of NIAAA properly pointed out, the expert panel was referring to "efficacy and not to reimbursability."

At this stage of the coverage inquiry, HHS officials again changed the procedures for the PHS disposition of the FDA and NIAAA report. On October 4, 1980, Dr. Perry stated that, al-

though Raleigh Hills Hospitals could submit additional written data for the record, he doubted whether anyone at the Center was competent to evaluate it. Dr. Perry also stated that medical and scientific experts would not be allowed to make oral presentations to the Center prior to the transmittal to the HCFA Administrator of the Center's recommendations on the safety and efficacy of this therapy, vetoing earlier assurances by Pierre Renault, M.D., of the Center. Later, the Office of General Counsel stated that the Center then planned to convene another panel of experts to hear oral presentations and to review only abstracts pertaining to the safety and efficacy of chemical aversion therapy. (In fact, this second expert panel was never convened by the Center.)

On February 4, 1981, the Center's report on chemical aversion therapy was forwarded by Dr. Renault to the Deputy Director for the Office of Coverage Policy, Bureau of Program Policy, HCFA. This report favorably recommended that this therapy modality should continue to be covered under Medicare.

We have recently received an advance copy of the final issuance of the clarification promulgated by HCFA on the coverage of chemical aversion therapy for the treatment of alcoholism. It reiterates that chemical aversion therapy, with emetine, in the treatment of alcoholism is covered under the Medicare program.

In conclusion, during the second evaluation period it was obvious that a number of HHS officials maintained their bias and prejudice against aversion therapy in the treatment of alcoholism, despite the fact that HCFA was to conduct an impartial review of this issue through informal rulemaking procedures. When the scientific issue was turned over to a body of impartial experts, they unanimously concurred in the view that chemical aversion therapy for the treatment of alocholism

is safe and efficacious. Even after this impartial report wa_ prepared, certain HHS officials sought to alter the conclusions that evolved from that report so that the first biased and flawed report of PHS would not appear to be so blatantly biased. It is a tribute to both the Freedom of Information Act and the sense of basic justice in certain public officials involved in this matter, that a clear paper trail of evidence indicating efforts to taint the second report and alter its medical and scientific opinions, saw the light of day.

III. RECOMMENDATIONS BY ADVANCED HEALTH SYSTEMS, INC. REGARDING THE FOIA.

As a result of the advantageous experience of Advanced Health Systems, Inc., and Raleigh Hills Hospitals with respect to the acquisition of materials under the Freedom of Information Act, it has both general and specific comments about the Act, its use and certain proposals to revise the legislation.

A. General Comments.

Without the use of the Freedom of Information Act, it is highly unlikely that AHS would have been able to attain a fair and unbiased determination of the Medicare coverage of its Raleigh Hills Hospital alcoholism treatment program. In the previous section, I related to you in some detail an unhappy history of this five-year long inquiry. Trying to track these events without the Freedom of Information Act would have been virtually impossible.

The opinion of Justice White in the Supreme Court case of Environmental Protection Agency v. Mink, 410 U.S. 78, 80 (1973), stated the purpose of the Freedom of Information Act: "(i)t seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." That quotation sum-

marizes precisely the role which the FOIA played in this issue of scientific policy.

Under our Constitution, the Legislative Branch was charged with creating law, the Executive Branch was established to enforce the law and the Judicial Branch was designed to interpret the law. In the first half of this Century, the Congress began to delegate certain responsibilities having characteristics of activities appropriate for each of the three branches of government to administrative agencies. In the evaluation of the use of chemical aversion therapy, with emetine, as an aspect of the Raleigh Hills Hospitals alcoholism treatment method, the HHS constituent agencies were engaged in making public policy. The evaluation was to be made on the basis of efficacy and safety. Since this was an issue for which factual evidence would be appropriate, one would assume that these agencies would have opened the administrative record for a full and complete evaluation. Instead, as we described, the process was secretive, biased and employed scientifically inaccurate information.

Only through the operation of the FOIA was AHS able to force a public issue into a public light. Unlike the specialized concerns of criminal investigation and foreign intelligence gathering, there was no reason for secrecy in this governmental decisionmaking. Just as the Courts and the Congress are required to act in a public light, the HHS evaluation should have taken place in a public light. The public has the right to know whether federal agencies are acting in a fair and just manner. The Administrative Procedures Act was enacted for this purpose. Except for the FOIA, however, it is unlikely that AHS would have had sufficient information to ensure that the improper activities of HHS saw the light of day. In our system of checks and balances, the FOIA acts as a check upon federal administrative action to ensure that information from even "unwilling official hands" and of improper employee activity reaches the public.

AHS and RHH are strongly opposed to changes in the structure of the FOIA which would make it more difficult to acquire information from federal agencies on issues involving scientific and health care policies. The FOIA works in part because it is simple and direct. Apparently, it is this simplicity that upsets certain federal officials. Some officials contend that "private" parties use the FOIA as a substitute for discovery during litigation, wasting the time of governmental officials and acquiring materials that they would not be entitled to in a legal action.

An examination of our controversy with HHS shows that the FOIA did permit AHS to acquire information from the government which might well have been both nondiscoverable and useless if it had been sought as part of a legal action. Although our client was not pleased that we had to resort to an expensive and time-consuming use of the FOIA to discover the status of our matter, AHS would have been far more unhappy either not to have received it until after a final decision had been made or not to have received it at all. While employing the FOIA was costly, having to bring a legal action would have been even more expensive.

AHS and RHH disagree with efforts to relax admittedly strict statutory guidelines for agencies with regard to responses to FOIA requests. In one experience, giving agencies additional latitude to support creative delay in responding to legitimate requests for information will probably result in more procrastination. There is ample leeway in the statute now, through informal cooperation between requesters and the agency, for an agency to employ its discretion as to whether information should be released. Although the agencies seldom, if ever, respond to FOIA requests in a timely fashion, the pressure of a deadline

having passed often forces the agencies to be more responsive, knowing that further delay and unreasonable nondisclosures will be frowned upon by a federal judge. In the end, the controversy reduces to a rule of reason. Changes in the response deadlines will only slow down the time by which a serious examination of of the request is taken by a federal official.

Nor does AHS or RHH support any distinction between "private" or "public" parties seeking information. Although the AHS requests serve a private end, the public was also far better served by an open, fair and scientifically sound determination of our controversy. Attempting to determine whether a given request serves private or public objectives is methodologically impractical; often such requests serve both objectives.

B. Specific Proposals.

1. Limitation on Number of Requests.

Although individuals requesting information from the government should not be able to paralyze an agency by multifarious requests, to place a limit on the number of requests for information at a particular agency, as proposed in S. 587, would be counterproductive and result in unsound public policy. Such a limitation would engender hypertechnical agency interpretations of what was actually requested. We found it necessary to file a dozen Freedom of Information Act requests in our particular matter, even though we were dealing primarily with one topic and one Department. Since materials are organized in so many different ways, such a limitation would not make practical sense.

An additional difficulty with this section is that it would permit an agency to initiate a number of harassing activities against a private party, with that party being limited in recourse for information to a sole FOIA request.

2. PSRO Lag Period.

In the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 42 U.S.C. § 1320c-15 note (1981), a delay period of at least one year from the date of entry of a final court order requiring any materials to be disclosed by Professional Standards Review Organizations (PSROs) was enacted by the Congress. The Congressional intent, as referenced in the conference report, was to provide time for the Congress to have the benefit of full judicial consideration of the issue of disclosure of PSRO materials. AHS finds no valid reason for distinguishing PSRO materials from other HHS agency records. In many situations, PSRO decision-making takes the place of agency decision-making. To delay the receipt of materials for one year creates a great injustice to anyone seeking to acquire the information, since the PSROs now routinely deny all such requests, secure in the knowledge that they are virtually immune from the FOIA by virtue of this prohibitory section. For this dispute, AHS has sought information concerning the PSRO program from both the Department and individual PSROs.

AHS is interested only in the fair and just administration of the PSRO program with regard to AHS, and to ensure that AHS and Raleigh Hills Hospitals receive the process that is due them. The confidentiality of patient records is properly protected by the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, 42 U.S.C. § 4582 et seq.

We would submit that this type of ad hoc limitation on otherwise releasable documents is both unwise and unnecessary. This provision, which should not have been part of a Reconciliation Act at all, should be rescinded during this Congress.

3. Document Indexing.

A current difficulty in the procedural operation of the

FOIA concerns the quality of the governmental responses to requests. Often, when the government agency claims that material is exempt from disclosure, it fails to provide the requester with sufficient information to determine whether the withheld document is blanketly exempt or only exempt-in-part.

When the government litigates over the withholding of material it claims to be exempt, as the result of the holding in Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977 (1974), it is required to itemize the deleted portion of the document correlated with the alleged statutory justification for the withholding. Providing for the preparation of a Vaughn-type index (perhaps at the option and expense of the requester) prior to litigation would avoid unnecessary burdening of the courts with premature suits.

4. Disclosure of Real Party Seeking Information.

We understand that many commercial enterprises seek information through substituted (nominee) persons. Except in situations where corrupt or otherwise illegal governmental activity is suspected, we contend that parties seeking information should be required to state their true interests.

5. Cooperation Between Requesters and Governmental Officials.

While not the type of procedure which should be covered in statutory requirements, AHS contends that part of the difficulty in resolving FOIA disputes is the mere genuine lack of effort at accomodation.

Many federal judges have required as part of their pre-trial orders that discovery disputes must be attempted to be resolved by an actual meeting between the opposing parties prior to the seeking of judicial resolution. A similar approach should be suggested by the Committee Report language of any FOIA reform legislation. A face-to-face meeting among agency program and

FOIA officials and requesters prior to or as a result of an agency appeal on the disputed materials would be advisable.

6. Time Extensions For Agency Response.

S. 587 contains a provision which would gauge the period of time permitted for an agency response to a FOIA request according to the number of pages encompassed by the request. For each two hundred pages of requested material, sixty additional working days would be given to an agency to respond to a request. Although AHS recognizes that the present 10-day response period may be unrealistic for certain requests it, nevertheless, opposes efforts to revise the time for agency response to requests. If revisions are to be made, AHS applauds the intent of S. 587 to develop an objective test for an alternative time period, although the criterion chosen has certain disadvantages.

The size of dimension of a request is only one aspect of potential difficulty in an agency responding in a timely and responsible fashion. Other problems involve the categories chosen by an agency for storing or retrieving records, the age of the records and the number of officials who have dealt with the records prior to storage.

A response involving a considerable number of documents may have repetitive or similar pieces of information which would require little, if any, close scrutiny by an FOIA officer. In such a case, a ten-day response period is entirely appropriate. In other cases, where each piece of paper must be closely read, the sixty working day period proposed by the bill would permit an FOIA officer to review as little as an average of slightly over three pages per day.

A preferable alternative would permit an agency to request additional time periods for response based on a number of factors such as the location of the records, their age, the

need for close review, etc. Rather than an automatic extension, the use of, for example, a magistrate to determine the propriety of an agency request for an extension of time, would be a better procedure in contested extension requests.

IV. CONCLUSION.

The Freedom of Information Act has provided a window into the operations of our democratic government. AHS and RHH have found that the FOIA has provided a vehicle for the protection of its legal rights and for the vindication of a medical delivery system, the treatment of the disease of alcoholism. The ultimate success of RHH and AHS not only inures to their corporate benefit but also to the benefit of the public at large since the individuals who can now continuously avail themselves of professional and medical services under the Medicare coverage guidelines are in desperate need of responsible treatment for a disease which has a substantially deleterious fiscal and medical impact on our society as a whole.

It is respectfully submitted that any proposals which would substantially change or alter the underlying purposes of the FOIA would do a disservice to both private and public citizens. In our case, justice was served through the responsible use of the FOIA - any legislative changes should not undercut the basic purposes of the Act, namely the right of citizens to know what their government is doing. In our instance, information secured through the FOIA which was unavailable elsewhere provided an opportunity to change what would have been a disastrous result with far-reaching impact beyond the corporate entities involved. The FOIA should continue to fulfill this laudatory purpose.

On behalf of our clients, we thank you for the opportunity to express our views, and we would be delighted to respond to any questions you might have as a result of our testimony.

Senator HATCH. Dr. Worthen.

STATEMENT OF DAVID M. WORTHEN, M.D., ASSISTANT CHIEF MEDICAL DIRECTOR FOR ACADEMIC AFFAIRS, VETERANS' ADMINISTRATION

Dr. WORTHEN. Thank you, Senator Hatch and Mr. Rader. I welcome the opportunity to share my observations with you as you deliberate amendments to the Freedom of Information Act.

I appear before you today as an ophthalmologist, as a former chairman of the FDA Ophthalmic Devices Section, but most importantly as a citizen concerned about fairness and balance in the process of government.

My concern about the Freedom of Information Act falls into three categories. First, the act has permitted the premature release of sensitive expert advisory testimony and discussions of preliminary research data which was detrimental to the process of scientific merit review.

My second concern is that an over attention to the Freedom of Information Act and the required assembling of information has slowed down the process of device review and regulation, thereby denying the public timely access to newly developed devices for visual rehabilitation or care.

Specifically, the other 212 ophthalmic devices, including contact lenses, were put on the back burner for over a year while responses to the Freedom of Information Act requests delayed their review.

My third concern is with the fee waivers for public interest groups which not only allows but may tend to encourage a form of harassment of a Government agency, thereby reducing its efficiency and not allowing it to meet its responsibilities to the public at large.

I will limit my discussion to my experience with the investigation of intraocular lenses beginning in 1975.

A cataract is an opacity of the natural lens inside the eye. When a cataract is removed from a human eye, the ability to focus is lost. Restoration of function can be brought about by the use of glasses, contact lenses, or the implantation of a small plastic lens at the same site as the original natural lens.

Improvements in design, implantation technique, and specific location of the lenses have brought the technology to the point that it is a commonplace operation done throughout the United States.

However, in 1975 as the device legislation was in the final stages of preparation, there was a controversy. The lenses were not accepted by all ophthalmologists. Therefore they were subject to FDA study, but specific language was placed in the medical device amendments of the Food, Drug, and Cosmetic Act demanding that the lenses be made reasonably available since they were already in such common use throughout the country.

As the section developed the plans for the study, there was little comment from the public interest groups although full participation by the public member on the section. There was an active and healthy debate of all controversies between members of the ophthalmology profession, Food and Drug Administration staff members and statisticians, representatives of industry, and representatives of organized medical groups.

The regulations were published, and intraocular lenses went under investigational status prior to premarket approval in February of 1978. The study proceeded in an orderly manner, and in November 1979 a timely report was made to the ophthalmologists at their annual education meeting.

In that same month, November 1979, without informing the section members, the Food and Drug Administration released the transcripts of closed session debates on intraocular lenses to the Health Research Group in response to several Freedom of Information Act requests. Subsequently the transcripts of many meetings were released.

Those released transcripts would allow anyone knowledgeable in the field to trace the people speaking and, more importantly, the data discussed concerning individual companies.

On the basis of that, no more closed sessions were held during the time I chaired the section. As legal counsel indicated, there was no guarantee that they would not be simply released pro forma.

Throughout the period 1979 to the present, I asked various staff members at FDA on numerous occasions, including public gatherings, why there was such a delay in our ability to process the intraocular, contact lens, and other device premarket approvals. A major reason given at each time was the time required to assemble information on the required Freedom of Information Act requests which left insufficient staff time to prepare the other normal working materials.

In the 2 years since the FDA released closed transcript information to HRG, there has been no further timely reporting to the profession regarding intraocular lenses because of the ensuing litigation.

In summary, my concerns about the Freedom of Information Act are: One, the release of closed session transcripts; two, the overloading of staff in those regulatory agencies which allow imbalances to occur; and, three, the misuse of fee waiver to consumer interest groups.

The most valued asset a professional has is his or her reputation. For industry, it is a record of safe and effective medical products. I have become disenchanted with the concept that information freely given has benefited the public. Rather, its use in this case has served to further litigation, conflict, strife, and in the end perhaps even reduced protection of the public through denial of valuable information to both the profession and the public.

It has been confusing to the public and created an unnecessary doubt regarding the integrity of the medical profession and American industry. I plead that such an imbalance be rectified.

Senator HATCH. Thank you, Dr. Worthen.

[The prepared statement of Dr. Worthen follows:]

PREPARED STATEMENT OF DAVID M. WORTHEN

Mr. Chairman and Members of the Committee:

I welcome the opportunity to share my observations with you as you deliberate amendments to the Freedom of Information Act. My name is David M. Worthen, M.D., I am a board certified ophthalmologist and prior to August 1980 was Professor of Ophthalmology at the University of California in San Diego. Prior to that I was on the faculties of the University of Florida and Harvard Medical School. I currently hold a faculty position at Johns Hopkins University Medical School. My current position is Assistant Chief Medical Director for Academic Affairs within the Veterans Administration and I have cleared with the Administration my testimony here today.

From 1975 through 1980 I was a member of the Ophthalmic Devices Section of the Food and Drug Administration's Ophthalmic, Ear, Nose, and Throat; and Dental Devices Advisory Panel. The Ophthalmic Devices Advisory Section consists of ophthamologists, optometrists, other scientists, a public member and a representative from the ophthalmic devices industries. The members are selected by the FDA and generally serve for three years. I chaired all the sessions concerning intraocular lenses and was the overall chairman of the Section from 1977 through 1980. I continue as a consultant, am in weekly contact with the agency and still actively review submissions on a regular basis.

In the past I have been a consultant to pharmaceutical and instrument manufacturers but have never received remuneration from any intraocular lens company. I have voiced my concerns about Freedom of Information Act in a number of public forums, including meetings of the Ophthalmic Device Section here in Washington.

I appear before you today as an ophthalmologist, as a former chairman of the FDA Ophthalmic Devices Section, and most important, as a citizen concerned about fairness and balance in the process of Government.

My concern about Freedom of Information Act falls into three categories. First the act has permitted the premature release of sensitive expert

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advisory section testimony and discussions of preliminary research data which was detrimental to the process of scientific merit review.
The second concern is that over-attention to the Freedom of Information Act and the required assembling of information has slowed down the process of device review and regulation thereby denying the public timely access to newly developed devices for visual rehabilitation or care. Specifically the other 212 ophthalmic devices including contact lenses were "put on the back burner" for over a year while responses to Freedom of Information Act requests delayed their review.

My third concern is the fee-waivers for public interest groups which not only allows but may tend to encourage a form of harassment of a government agency thereby reducing its efficiency and not allowing it to meet its responsibility to the public at large.

I will limit this discussion to my experience with the investigation of intraocular lenses beginning in 1975. A cataract is an opacity of the natural lens inside the eye. When a cataract is removed from a human eye the ability to focus is lost. Restoration of function can be brought about with the use of glasses, contact lenses, or the implantation of a small plastic lens at the same site as the original natural lens. In 1946, an ophthalmologist in England, noting that fragments of plexiglass from the windshields of fighter planes were well tolerated within the eye, implanted a plexiglass lens into a patient's eye following removal of the cataract. Some of those lenses were still in place many years later. Since that time improvements in design, implantation technique and specific location of the lenses has brought the technology to the point that it is a commonplace operation done throughout the United States. However, in 1975, as the device legislation was in the final stages of preparation, there was a controversy. The lenses were not accepted by all ophthalmologist. Therefore specific language was placed in the Medical Device Amendments to the Food, Drug and Cosmetic Act demanding that the lenses be made "reasonably available" since they were already in such common use throughout the country.

When the Ophthalmic Devices Section developed the study protocol and design, that language from the Medical Device Amendments made the intraocular

lens study different from other clinical trials done in research centers. As the section developed the plans for the study, there was little comment from the public interest groups although full participation by the public member on the section. There was an active and healthy debate of all controversies between members of the ophthalmology profession, Food and Drug Administration staff members and statisticians, representatives of industry, and representatives of organized medical groups. The regulations were published and intraocular lenses went under investigational status prior to premarket approval effective February 9, 1978. The study proceeded in an orderly manner and in November 1979 a timely report was made to the ophthalmologists at their annual education meeting.*

In late 1979 there was increased activity on the part of the Health Research Group (HRG), a part of the Ralph Nader Public Citizen Organization. At the same time that the initial report to the ophthalmologists was being presented in November 1979 and without informing the section members, the Food and Drug Administration unilaterally released the transcripts of the closed session debates on intraocular lenses to the Health Research Group in response to several HRG Freedom of Information requests. Subsequently the transcripts of many meetings were released.

The Section meetings had been held with a clear understanding that they would be respected as closed sessions to allow full freedom of discussion. At no time were the section members instructed that they were operating under circumstances that would allow disclosure. Those released transcript would allow anyone knowledgeable in the field to trace the people speaking and more importantly the data discussed concerning individual companies. On the basis of that, no more closed sessions were held during the time I chaired the section. As legal counsel indicated, there was no guarantee th they would not simply be released proforma.

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* Report of the initial presentation and an update detailing the issues which ensued are outlined in the two reprints from the medical literature attached to my written testimony.

Comments taken out of context and not easily understood by anyone unless they were present during those deliberations were used as evidence that the FDA was not listening to the Advisory Section. Therefore the then Commissioner of the FDA, Dr. Jere Goyan elected to conduct a special review of the intraocular lenses investigational study. Testimony was received on January 7 and February 12, 1980 with 13 questions specifically asked by the Commissioner.

The Section was given 60 days to respond and on March 7 the report was delivered to the Commissioner making some constructive suggestions but basically reaffirming both the study to date and continuation of the study. In a bureaucratic confusion, a letter was received from the Commissioner on May 14, 1980 concurring with the Section's recommendations and endorsing their report; however, the signature was that of the Deputy Commissioner, Mark Novitch, M.D.

A second presentation was made at the annual education meeting of the ophthalmologists in November 1980 with the understanding that there had been concurrence with the special Section recommendations. During the next section meeting, following the November 1980 ophthalmologist's annual meeting the Health Research Group attorney gave public testimony that Dr. Novitch denied signing the letter saying that it was signed by a signature machine; further, that HRG had received copies of internal FDA correspondence not sent to the Section.

Since November 1979 there has been no timely release of information to the medical profession because of the ongoing litigation involved in the Freedom of Information Act dispute.

Throughout the period from November of 1979 to the present, I asked various staff members at FDA on numerous occasions, including public gatherings, why there was such a delay in our ability to process the intraocular lens, contact lens, and other device premarket approvals. A major reason given at each time was the time required to assemble information on the required Freedom of Information Act requests which left insufficient staff time to prepare the other normal working materials.

One distressing fact throughout this interval was the communication of the Commissioner and staff with the press and the Health Research Group. It was in contrast to contact with the Advisory Committee or the professionals concerned with the use of these devices.

It was difficult as Chairman of the Committee and one who is personally committed to the protection of these human subjects to find out the unfolding events from newspaper reporters rather than the Agency for whom I spent many hours each week as a public service and with no remuneration.

In the two years since the FDA released closed transcript information to HRG there has been no further timely reporting to the profession regarding the use of these lenses. There have now been approximately a half million lenses implanted in this country yet the profession knows very little about those resu[illegible]ch would be helpful in guiding the profession. Those results have bee[illegible] denied because of the legal interactions precipitated by the release of inf[illegible]ation under the Freedom of Information Act.

In summary, my concerns about the Freedom of Information Act are: 1) the release of closed session transcripts; 2) the overloading of staff in those regulatory agencies which allow imbalances to occur; 3) the misuse of fee-waiver to "consumer interest" groups.

I feel compelled to point out that these self-appointed consumer groups often times have incomplete information and assume that those who care for patients are not concerned about their patients. I feel it necessary to point out that the most valuable asset a professional has is his or her reputation. For those in industry their most valuable asset is a record of safe and effective medical products. I have become disenchanted with the concept that information freely given has benefited the public. Rather its use in this case has served to further litigation, conflict, strife and in the end perhaps even reduced protection of the public through denial of valuable information to the profession. It has been confusing to the public and created an unneccessary doubt regarding the integrity of the medical profession and American industry. I plead that such an imbalance be rectified.

Senator HATCH. Mr. Jacobs.

STATEMENT OF JERALD JACOBS, ESQ., REPRESENTING THE AMERICAN INTRA-OCULAR IMPLANT SOCIETY AND THE INTRAOCULAR LENS MANUFACTURERS ASSOCIATION

Mr. JACOBS. Thank you, Mr. Chairman.

I am pleased to be here today on behalf of the American Intra-Ocular Implant Society, an organization of some 3,000 eye surgeons, and the Intraocular Lens Manufacturers Association, an organization of 12 medical device manufacturing firms.

Our law firm serves as counsel to both organizations and has been involved on their behalf in extensive Freedom of Information Act litigation stemming from attempts by requesters to obtain information from Government agencies that our clients consider trade secret or confidential commercial, business, or scientific information.

We would like to suggest to the subcommittee this morning two amendments to the Freedom of Information Act, the need for which has become clear to us during the course of our FOIA litigation experience.

First, there is a need for more specific protection of confidential business and scientific information to avoid the constant burden and expense of defending the confidentiality of such information in the hands of Government agencies.

Second, there is a need to abolish fee waivers for so-called public interest groups who have utilized the act excessively to a point bordering on harassment of both the Government agencies that have custody of the information and of the individual and corporate submitters of that information.

First, the trade secret protection: In order to put these suggestions in their proper context, I would like to briefly recount the details of a typical Freedom of Information Act case which is still pending before Judge Charles Richey in the U.S. District Court for the District of Columbia.

Dr. Worthen has already described the history of the intraocular lens—a tiny plastic or glass disc implanted in the human eye to replace the natural lens removed due to cataracts. As Dr. Worthen has explained, when Congress enacted the medical device amendments to the Food, Drug, and Cosmetic Act, it included a requirement that intraocular lenses remain reasonably available to qualified surgeons as a treatment for cataracts while additional data on the safety of the devices were being collected.

Pursuant to this legislative mandate, perhaps the largest clinical studies of any medical product in history were jointly initiated in 1978 by 12 manufacturers of intraocular lenses under FDA authority.

In their individual applications to the Government, each firm submitted voluminous information on manufacturing methods, prior experience data, lists of surgeons who had been approved as investigators, patient protection procedures, and other matters.

As the studies have progressed, FDA has continued to require that both surgeon investigators and manufacturers submit a series of detailed reports on every implantation of a lens that occurs anywhere in the United States. To date, an estimated 6,000 eye

surgeons have implanted lenses in some 500,000 subjects during these studies. Over 20 million items of information about the safety of intraocular lenses have been accumulated at a direct expense estimated at $25 million.

In early 1979, while the studies were progressing on schedule, Ralph Nader's Public Citizen Health Research Group began filing repetitive FOIA requests with FDA, seeking access to virtually all of the data on file with the Agency for every intraocular lens implantation, including customer lists and preliminary clinical study results. FDA denied much of the requested information—denials that resulted in HRG filing suit against the FDA and the corporate submitters of the contested information.

The issue in the litigation is whether or not the information withheld from HRG can properly fall within the statutory definition of "trade secret" or "confidential commercial information."

In defense of its position, the Agency was put to the task of preparing an index identifying each withheld document and specifically enumerating for HRG the reason for each document's being withheld.

I have on my left the Government's prepared index of all the documents requested by the Public Citizen Health Research Group in this litigation. You can see its massive size.

FDA regulations make it clear that once an agency has designated documents as "trade secret" or "confidential commercial information" the burden of defending the confidentiality of the documents falls upon the submitters of the information.

One example of the realities of this burden is the massive brief filed by the submitters in our pending case to support FDA's decision against disclosure. The brief includes as an attachment a 125-page report of retained expert economists who argue that disclosure of the contested information would cause serious economic harm to the submitters. So far, total litigation expenses of the corporate submitters have exceeded $100,000. A recurrence of this great waste of Government and private resources could be avoided with revisions to the Freedom of Information Act.

The exemption for trade secrets should be mandatory, not discretionary, with the Government agencies; and the definition of what constitutes trade secret or confidential commercial information should be defined in the act itself as any information, the disclosure of which would impair the legitimate private competitive interests of the submitter and is customarily held in confidence by the submitter.

We therefore support particularly S. 1730 and its provisions for trade secret protection, especially because they clearly define the protection for research information as the chairman discussed this morning.

Next, the issue of fee waivers: The FOIA permits an agency to waive or lower the fees normally charged for search time and copying for so-called public interest groups. Although the goal of this provision is laudable, it has evolved into a license for self-styled public interest groups to harass and tie up Government agencies, causing them to spend an absurd proportion of their time and resources responding to FOIA requests rather than doing the work Congress intended them to do.

I have here a computer printout of all FOIA requests submitted by the Public Citizen Health Research Group—one public interest group—to the Food and Drug Administration—one modest-sized Government agency—since 1978. The printout is 74 pages of interlocking paper, running to 52 feet. There are over 500 FOIA requests listed, an average of more than 1 for every business day during the last 4 years.

To the extent that the organization received any information as a result of these staccato requests, it generally paid no fees or expenses whatsoever. The charges were borne by taxpayers.

The fee waiver provision clearly licenses so-called public interest groups to conduct fishing expeditions, merely in the hope of turning up something controversial. It also enables them to tie up an agency proceeding almost indefinitely.

As Dr. Worthen has testified, for almost 2 years the FDA's Bureau of Medical Devices placed virtually its entire study of intraocular lenses and all other ophthalmic devices on the back burner while it took care of the mechanics of responding to the endless barrage of FOIA requests. The public, which during this time was denied access to innovative devices, was the real loser. To add insult to injury, the public was required to support HRG's endeavors as a result of the fee waiver provisions.

As a final punctuation of the unworkability and abuse of the fee waiver situation, we call the subcommittee's attention to recent correspondence entered into the record in these hearings from Chairman Hatch to the FDA inquiring as to the extent of agency resources expended in responding to FOIA requests from one group, the Public Citizen Health Research Group, to FDA regarding intraocular lenses.

In an October 2 letter from the FDA Commissioner, Dr. Arthur Hull Hayes, some startling statistics are revealed. HRG has made 77 separate requests to the Agency regarding intraocular lenses. Three person years, at an estimated cost to taxpayers of $90,000, have been expended in making the FDA responses. As Dr. Hayes explains:

> In accordance with the FOI Act, FDA could only charge about $2,000 in fees. In this particular instance, even those fees were waived since the information was considered as primarily benefiting the public.

The suggested amendments to provide clear trade secret protection and abolish fee waivers would help put the FOIA back into the context Congress originally intended—to provide a window into the workings of Government rather than an obstruction to the workings of Government.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Jacobs follows:]

PREPARED STATEMENT OF JERALD A. JACOBS

Good morning, Mr. Chairman and members of the Sub-committee. I am pleased to be here today on behalf of the American Intra-Ocular Implant Society, an organization of some three thousand eye surgeons, and the Intraocular Lens Manufacturers Association, an organization of twelve medical device manufacturers. Our firm serves as counsel to both organizations and has been involved on their behalfs in extensive Freedom of Information Act litigation stemming from attempts by requesters to obtain information from government agencies that our clients consider trade secret or confidential business or scientific information.

We are grateful for this opportunity to speak before the Subcommittee about amendments to the Freedom of Information Act that we believe would make the Act more workable, both from the point of view of government agencies that respond to requests and from the point of view of private individuals or companies that submit confidential business or scientific information to the government agencies. You have heard from several witnesses about the need for amendments to the Freedom of Information Act. We would like to confine our remarks to two areas where the need for change has become very clear to us during the course of our FOIA litigation experience:

1. There is a need for more specific protection of confidential business and scientific information to avoid the constant burden and expense of defending the confidentiality of such information in the hands of government agencies.

2. There is a need to abolish fee waivers for so-called "public interest groups" who have utilized the Act excessively to a point bordering upon harassment of both the government agencies that have custody of the information and of the individual or corporate submitters of the information.

THE NEED FOR MORE SPECIFIC TRADE SECRET PROTECTION

In order to put these suggested amendments in their proper context, I would like to briefly recount the details of an actual and typical FOIA case which is still pending before Judge Charles Richey of the U.S. District Court for the District of Columbia.

Dr. Worthen has already detailed the history of the intraocular lens — a tiny plastic or glass disc implanted in the human eye to replace the natural lens removed due to cataracts. As Dr. Worthen has explained, when Congress enacted the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, it included a requirement

that intraocular lenses remain "reasonably available" to qualified surgeons as a treatment for cataracts while additional data on the the safety of the devices were being collected.

Pursuant to this legislative mandate, the largest clinical studies of a medical product in history were jointly initiated in 1978 by twelve manufacturers of intraocular lenses and under the authority of the Food and Drug Administration. In their individual applications to the government, each firm submitted voluminous information on manufacturing methods, prior experience data, lists of surgeons who have been approved as investigators, patient protection procedures and other matters. Furthermore, as the studies have progressed, FDA has required that both surgeon/investigators and manufacturers submit a series of detailed reports on every implantation of a lens that occurs anywhere in the United States. To date, an estimated 6,000 eye surgeons have implanted lenses in some 500,000 subjects during these studies. Over 20 millior items of information about the safety of intraocular lenses have been accumulated at a direct expense estimated at 25 million dollars. Currently, the manufacturers are in the process of submitting, and many have already submitted to the FDA, their Premarket Approval applications for permission to freely market their respective lenses on the basis of the safety information provided to the agency. At every stage of the studies, the FDA has provided for scrupulous procedures to assure that all aspects of each lens are carefully observed, pursuant to the mandate of the Medical Device Amendments.

In early 1979, while the studies were progressing on schedule, Ralph Nader's Public Citizen Health Research Group began filing repetitive FOIA requests with FDA, seeking access to virtually all of the data on file with the agency for every intraocular lens implantation, including customer lists and preliminary clinical study results. Based primarily on the trade secret exemption to the Act (5 U.S.C. 552(b)(4)) FDA denied much of the requested information — denials which resulted in HRG filing suit against the agency and the corporate submitters of the contested information.

At this point, the issue in the litigation is whether or not the information withheld from HRG can properly fall within the statutory definition of "trade secret or confidential commercial information." In defense of its position, the agency was put to the task of preparing an index which itself ran in excess of 400 pages, identifying each withheld document and specifically enumerating for HRG the reasons for its being withheld.

Furthermore, the Corporate submitters in the suit have been put to the enormous burden and expense of justifying to the satisfaction of the court why each of the documents at issue is trade secret or confidential commercial information. FDA regulations make it clear that, once the agency has designated documents as trade secret, the burden of defending the confidentiality of the documents falls upon the sumitters of the information. One example of the realities of this burden is the massive brief filed by the submitters in our pending case to support FDA's decision against disclosure. The brief includes as an attachment the 125-page report of retained expert economists who argue that disclosure of the contested information would cause serious economic harm to the

submitters. So far, total litigation expenses of the corporate submitters have exceeded $100,000.

A recurrance of this great waste of government and private resources could be avoided with two minor revisions to the FOI Act. First, the (b)(4) exemption for "trade secret or confidential commercial information" should be mandatory, not discretionary with the government agency. Second, the definition of what constitutes trade secret or confidential commercial information should be defined in the Act itself as any information, the disclosure of which would impair the legitimate private competitive interests of the submitter and is customarily held in confidence by the submitter. The first amendment would cut off litigation possibilities when the agency decides to discretionarily release confidential business information, as it now can do under the Act. The second amendment would simplify litigation over what falls under which conventional definition of trade secret or confidential commercial information. The agencies would likely have the burden of litigating every contested FOIA trade secret exemption decision greatly reduced.

THE NEED TO ABOLISH FEE WAIVERS

Section 552(b)(4)(a) of the FOI Act permits an agency to waive or lower the fees normally charged for search time and copying for so-called "public interest groups." Although the goal of this provision is laudable, it has evolved into a license for self-styled "public interest" groups to harrass and tie up government agencies, causing them to spend an absurd proportion of their time responding to FOIA requests rather than doing the work Congress intended them to do.

I have here a computer print-out, produced by the FDA pursuant to our own request under the FOIA, of all FOIA requests submitted by Public Citizen Health Research Group to FDA since 1978. The print-out is 74 pages of interlocking paper, running to 52 feet. There are over 500 FOIA requests listed — an average of more than one for every business day during the last four years. To the extent that the organization received any information as a result of these staccato requests, if generally paid no fees or expenses whatsoever. The charges were borne by taxpayers.

The fee waiver provision clearly licenses and so-called "public interest" group to conduct fishing expeditions, merely in the hope of turning up something controversial. It also enables them to tie up an agency proceeding almost indefinitely. As Dr. Worthen has testified, for almost two years the FDA Bureau of Medical Devices placed virtually its entire study of intraocular lenses and other ophthalmic devices on the "back burner" while it took care of the mechanics of responding to the endless barrage of FOIA requests. The public, which during this time was denied access to innovative new devices, was the real loser. To add insult to injury, the public was required to support HRG's endeavors as a result of the fee waiver provisions.

What is even more unbelievable, HRG has compiled the data that it has received from FDA on intraocular lenses and is actually marketing the data, along with other services, for $280 to plaintiffs' attorneys who are involved in intraocular lens product liability and medical malpractice suits. Clearly, Congress did not intend this gross misapplication of taxpayer funds when it enacted the fee waiver provision.

As a final punctuation of the unworkability and abuse of the fee waiver situation, we call the Subcommittee's attention to recent correspondence, entered into the record of these hearings, from Senator Hatch to the FDA inquiring as to the extent of agency resources expending in responding to FOIA requests from the Public Citizen Health Research Group regarding intraocular lenses. In an October 2 letter from the FDA Commissioner, Dr. Arthur Hull Hayes, Jr., some startling statistics are revealed. HRG has made 77 requests to the agency regarding intraocular lenses. Some three person years, at an estimated cost to taxpayers of $90,000, have been expended in making the FDA responses. As Dr. Hayes explains, ". . . in accordance with the FOI Act, FDA could only charge about $2,000 in fees. In this particular instance, even those fees were waived since the information was considered as primarily benefiting the public."

CONCLUSION

The suggested amendments, which would provide better trade secret protection and abolish fee waivers, would help put the FOI Act back into the context Congress originally intended — to provide a window into the workings of government, rather than an obstruction to the workings of government.

Again, we are grateful for this opportunity to be here today. We stand ready to assist the Subcommittee in any way as it progresses in the drafting of these necessary amendments.

Thank you.

Senator HATCH. Thank you.

Let me just ask this of the panel as a whole before we consider any specifics. I would like to address a broad policy question to the entire panel. We have just heard testimony from different representatives of the business community who seem to present different messages.

Mr. Perito, you have testified that businesses need a strong FOIA to keep abreast of Government regulations that might substantially affect them. Mr. Milgrim, on the other hand, suggests that FOIA endangers vital corporate interests or commercial secrets.

In simple terms, is FOIA a boon or a burden to businesses? How would you reconcile the benefits of the act with its burdens? And do you think that potential disclosures of confidential commercial information might be the price for obtaining information necessary to keep a massive government in check?

Let us start with you, Mr. Migrim, then Mr. Perito, Dr. Worthen, and Mr. Jacobs.

Mr. MILGRIM. I do not feel that there are necessarily inconsistent answers present in the viewpoints suggested here. It seems to me that there is a clear public policy statement behind FOIA which favors giving proper access to information which may affect the citizenry or some part of it. What we are talking about now is balancing and fine-tuning this method of the citizenry having access.

We have found in practice in the area of my immediate concern—and I apologize if I appear to be close-focused—that when businesses lodge trade secrets and confidential business information it is the rarest case than anyone having a so-called public interest is interested in such information. Rather, there are often pecuniary motives which pique the curiosity.

I think that is an aspect which the modifying legislation can hold in check while still giving access to overriding Government issues.

Mr. PERITO. Mr. Chairman, I likewise do not see that the testimony is necessarily in conflict. I think a designation of trade secret confidential information by the submitter—wherein there is an assurance that, if that information is requested by a requester, that notice be given and an attempt will be made to keep that information confidential—solves many of the problems.

In addition, I see in my practice, which consists to a great extent of representing members of the business community who have been involved in inquiry by certain agencies—for example, the SEC—that the fact that the FOIA is misused often precludes an individual, for example, from cooperating with the enforcement group of the SEC. One, that individual might not want to, and it would be inappropriate to, go to the Justice Department and seek immunity under 6002 of title 18. Yet, on the other hand, that information could be a critical link in an investigatory process.

If, in fact, there is a way—and I believe there is—to assure proper protection of that private individual, the business interests are served of a viable market, and at the same time FOIA is not necessarily perverted from its basic purposes.

I am concerned with how in fact we draw the language on trade secret. I think a great deal of attention has to be addressed to the

drafting problem. That does not mean, in fact, that business interests and the public interest necessarily are antagonistic.

Senator HATCH. Dr. Worthen?

Dr. WORTHEN. I do not have training in the law, and so I cannot speak to the specifics; I can only speak from the standpoint of how it affected me as a professional.

I spent a number of hours with the attorneys from HRG and with various FDA staff members trying to educate them to the nuances involved in the nature of this very large research study. Unfortunately, despite that attempt at a crash course, the misinformation and the misunderstandings that occurred were monumental.

In the days when we had closed session hearings and before all of this began, we would extract from the closed session hearings professional opinions and bring them to the open hearings to share them with the public when we felt we had the data to make scientific conclusions.

The problem that ensued following this was that we had only open sessions, and in those open sessions we could not have frank discussions. This forced much of the discussion into hallway conversations or raised a very clear-cut risk to certain manufacturers to disclose in open session components of the research which would divulge trade secrets.

I must say that I felt very uncomfortable during those hearings, and we threaded our way very carefully over a number of hours to try to reach some sort of a compromise. I would like to see balance restored so that those compromises were not necessary.

I am personally a strong believer in openness, frankness, and honesty; but in this case it interfered with a professional's ability to try to guard the public. The cascade from that is: 2 years later we have made no timely report, and I feel extremely remiss as a physician that I have not informed my colleagues about the mass of data that is available which would be helpful to them in caring for their patients.

Senator HATCH. Just one additional point while you are chatting with us, Dr. Worthen: Do you think that the imbalance which you mentioned in your statement has hampered development of other innovative technologies, as they apparently have intraocular lenses? As you understand S. 1730, would it address adequately the need for change in the act?

Dr. WORTHEN. I do not know the details of the bill, and I do not know that I would understand it if I did know the details of the bill. My concern is not the development but the great backlog of developed products which are not available because of the nature of the study.

For example, there are a number of new contact lens innovations which, because of the backlog created by this problem, have not been made available to the public. Gradually that great logjam is being cleared. I have spent many hours, and continue to—I spent 8 hours last week—reviewing proposals, trying to assist the FDA in getting these proposals ready so the public can have access to them.

But I saw great frustration for a year and a half as the two or three people we have in the FDA to work on this were consumed almost full time in preparing these sort of information requests.

Senator HATCH. Mr. Jacobs?

Mr. JACOBS. Mr. Chairman, I concur, particularly with the two other attorney presenters, that conflicts are not presented by the four statements this morning. In fact, all the presenters are very much in favor of the goals of the Freedom of Information Act; but we are suggesting some fine tuning to make it more workable.

In our own situation we are most concerned with the enormous waste of expenditure that must be undergone in order to support a Federal agency decision not to disclose, as we are concerned by the abuses of overuse of the Freedom of Information Act by public interest groups who pay not one thin dime for their privileges under the act that everyone else must pay for.

Mr. MILGRIM. Mr. Chairman, may I add one thought to what has been said?

Senator HATCH. Sure.

Mr. MILGRIM. In my summary of comments which review specifically the administration's bill I question the wisdom of rewarding the successful requester by reimbursing attorney's fees and costs and not assuring the protection to the submitter whose information is improperly sought.

It seems to me that the problems we have here would all fall into a category where more evenhanded treatment, where people would bear their own costs and where the prevailing party—the party who was entitled to either have the information kept secret or disclosed—would have their costs paid, might discourage a lot of frivolous, capricious, and irresponsible activity, which I believe the administration's bill unintentionally will encourage by rewarding a successful requester but not having that requester bear the costs of an improper request.

Senator HATCH. Again, I might mention that you are speaking about the administration bill. S. 1730 seems to take care of that.

Mr. MILGRIM. That is correct.

Senator HATCH. OK. I think what I am going to do is submit a number of questions to you folks and have you answer them in writing for the record.

There are significant questions, and you can be of considerable help to the committee by reflecting on those questions as you review them and answer them.

With that, we certainly appreciate all the effort you have put forth in testifying before us today. I think your testimony has been very helpful. Thank you so much.

Our final witness today will be Mr. Jack Landau. We are pleased to call on him. Mr. Landau is the executive director of the Reporters Committee for Freedom of the Press.

He has been recognized widely for his excellence in journalism and news reporting, receiving a first prize for Washington correspondents for investigation of the military justice system by the Society of Professional Journalism along with several other distinguished journalism awards.

Before you begin, Mr. Landau, allow me to announce that the subcommittee intends to hold another hearing on S. 1730 and the

administration's proposal before proceeding to markup. This will allow all interested parties to make their views known on all the issues involved in this reform of the Freedom of Information Act.

Mr. Landau, we are happy to have you with us.

STATEMENT OF JACK LANDAU, DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCOMPANIED BY TONDA RUSH, DIRECTOR, FREEDOM OF INFORMATION SERVICE CENTER; BRUCE RICH, GENERAL COUNSEL, ASSOCIATION OF AMERICAN PUBLISHERS; AND JOAN HOFF-WILSON, DIRECTOR, ORGANIZATION OF AMERICAN HISTORIANS

Mr. LANDAU. Thank you, Senator.

I would like permission to introduce Bruce Rich, the general counsel of the Association of American Publishers, which is very interested in this act; and Tonda Rush, who is an attorney and the director of the Freedom of Information Service Center which the Reporters Committee operates, a society of professional journalists.

I think a lot of people both from the news media and academic community will welcome your announcement that this is not going to be the last day of hearings.

Senator HATCH. It will not be.

Mr. LANDAU. I think there was some consternation, especially because the administration bill just came out 1 hour ago, and it would be somewhat difficult.

Senator HATCH. Yes; we have to have at least 1 more day of hearings and go from there. So we would appreciate all interested groups getting information to us that might assist us in the final markup.

Mr. LANDAU. Also with us is Joan Hoff-Wilson, who is the director of the Organization of American Historians, which has also some problems with, I believe, your bill and would have some problems with the administration's bill if we were able to see it.

The book publishers feel very strongly and would only really like to comment at this stage on the expanded exemptions for law enforcement. They would also like to bring to your attention their concerns about the exemption in Senator D'Amato's bill, which I assume the subcommittee will take up at some point, for the CIA.

They feel, as I think most of us do, that a lot of significant benefits have been derived from the information which has come out under the FOIA from both the CIA and the FBI.

There has been a lot of informed debate on intelligence and law enforcement and related issues, and this has facilitated in turn as the years have gone by an historical and journalistic research revisiting of some of these agency decisions. It has, at the same time of course, intensified the public accountability of both the Agency and the Bureau.

The book publishers feel that the present legislative scheme is really consistent with the theory of Government information and informing the public. It is not clear that the FOIA as presently constituted has not been as ineffective in meeting the needs and confidentiality as the CIA and the FBI claim.

They think that passing the provision in your bill, Senator, and Senator D'Amato's bill would have a strongly negative impact on the people of information from these two agencies and would tend

to discourage and stop a lot of what I think most of us would think is legitimate journalistic and scholarly research into these areas.

They have submitted, as you may know, a list of books on foreign affairs—evaluations of American involvement in Vietnam, in Cambodia, in Angola, and so forth—significant portions of which have been produced by FOIA requests. Perhaps you might wish to take a look at the summaries of those books to see from the book publishers' perspective the value of the act.

So, I think they would ask you to reconsider the law enforcement exemption and Senator D'Amato's exemption.

The historian, I think, would join with the book publishers and with the Reporters Committee in opposing any expanded exemptions for either law enforcement or intelligence gathering and I think would join the Reporters Committee in opposing any expanded exemptions under the Trade Secrets Act, although I have to be fair and say some of the problems that were posed today in terms of pure research might be quite another problem that we have not dealt with.

The issues which most of us are most familiar with are the consumer and environmental requests out of the agencies. Pure research for intraocular devices is something which I had never heard of before, to be quite honest about it. It is difficult to evaluate the dissatisfaction with the act based on that one example.

The historians feel, especially I think with Senator D'Amato's bill, that a great deal of the historical research into American foreign policy, both by historians and political scientists, is going to be cut off because of the unilateral exemptive nature of his proposal, where there is no judicial recourse at all.

The archivists, who are with the historians, feel the same way. They feel that archival activities in terms of foreign policy are going to be signficantly impeded.

They also feel that contemporary history today tends to be written a great deal in terms of the internal decision-making process of agencies in trying to track how ideas get started inside of the State Department or inside of one desk in the State Department and are carried forward, and the same thing with intelligence gathering in that broadening the exemption will tend to really stop this type of analysis of how an idea or policy got started.

I think most of us tend to think—and I know historians do too—about the FOI Act case against President Nixon where we had 40 million documents. So the historians also feel that the exemptions should not be expanded in those two fields.

We feel that your bill and the administration bill are not minor modifications or fine-tuning of the act. We think they are a frontal assault on the act the way it has been in effect in the last 15 years.

What concerns us again and again—and you have heard this in the past—is that the FBI comes to you and says, "We need a broader exemption for confidential informants. We need an exemption that says not only, 'Will protect information which does disclose the identity but which tends to disclose the identity?' "

We say—and you have heard this I think from your other witnesses—the FBI has never been required in 15 years in any FOIA lawsuit to disclose the identity of a confidential informant. The exemptions that they have asked for, not only the tending to

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identify exemption but this mosaic theory they have put together—that if one or a number of unknown persons could, putting all their heads together, tend to find out some information that would be exempt after segregation—it all should be exempted.

And your expansion of the privacy exemption to take out not only clearly unwarranted but also to establish a right of privacy in dead people—which is not known at least in any of the laws of the States to my knowledge—is perhaps a little extreme. We cannot find any case law, sir, that is in regard to protection of dead people.

As to the Bureau's argument that it is too expensive, I believe the FBI budget is somewhere in the neighborhood of $637 million, and $11 million would be 1.5 percent of their total budget.

In view of some of the news stories that have been produced about monitoring political groups and persecuting certain persons who are unpopular in certain areas and conducting illegal activities of one sort or another, I wonder whether 1.5 percent of their budget is not a fair amount to pay to insure some type of oversight of this law enforcement activity.

In terms of the trade secret exemption, we realize there is a lot of consternation. The problem is, as Professor Stevenson showed, we cannot find any real trade secrets that have ever been disclosed, except for possibly two instances. I believe in those two instances, one of the trade secrets was voluntarily released by the corporation itself; so that we have one out of hundreds and hundreds.

Your bill—and I believe the administration bill—allows it to be exempted if it would impair—and I forget the exact wording—the legitimate competitive financial or business interests of any persons. I suppose any businessman thinks that any information about his company which is made public in any way is going to, in some way, impair his competitive position.

I think the current exemption which requires it to be a conventional trade secret or really confidential financial information the disclosure of which would have a significant anticompetitive impact is a pretty good, workable standard in most instances.

In terms of the costs, we would agree with you that the Government should charge those persons who can afford to pay—mainly people who request information from the Government for their own private, competitive, commercial use. We would favor what I think is the Justice Department's approach. I am sorry, but I just got this 45 minutes ago.

Senator HATCH. We understand. We have had to look at it hurriedly ourselves.

Mr. LANDAU. We would favor continuing the current law which says that the Government waive or reduce fees if it is substantially in the public interest. What we are particularly talking about is the scholarly community, the journalist community, academics, and public interest and political organizations—people who request information from the Government with the intent to publish it and inform the taxpayer about what is going on.

I would say, after what we have heard this morning, that perhaps some formula ought to be worked out for imposing limits on that type of thing—so many documents, so many hours of search time, or so many reproduction fees, up to a reasonable point, and perhaps have a sliding scale after that.

I think that is about everything within 10 minutes, sir.

Senator HATCH. That is fine, Mr. Landau.

Could I get you to react to several of the changes already incorporated in S. 1730 that differ from legislation which this committee began to consider last July? Let us begin with S. 1247. That bill contained a provision to change the fourth exemption to withhold all information "customarily not disclosed to the public by the submitter."

As I mentioned in my opening statement, this provision was patterned after the original Senate report language on FOIA. Nonetheless, several witnesses feared that it might give businesses too much latitude to unilaterally withhold information in Government files. Accordingly, we changed that provision in S. 1730 to add a few criteria to (b)(4) but essentially retained that exemption's current form.

If you have to make a choice, would you prefer S. 1730 or the S. 1247 provision; and do you think we have improved the provision that was formerly in S. 1247?

Mr. LANDAU. I do not think we would prefer either. Ultimately, what your bill and 1247 would do is leave up to the businessman essentially the decision as to whether the information should be made public. I think that decision really ought to be left up to the Government under some enforceable standard, sir.

The problem is that "trade secrets and confidential research or financial information or other commercially valuable information obtained from any person and privileged or confidential"—in that person's view, I assume—"where release may impair the legitimate private competitive financial, research, or business interests of any person" has three variable standards in it; whereas the current trade secrets exemption, as I said, has been interpreted by the courts, except for really conventional trade secrets, such as customer lists, secret formulas, and patents—it has to not only have been tightly held, but it has to cause a significant competitive harm at the least. That would seem to be a fairly workable standard.

Senator HATCH. What we have tried to do in 1730 is add criteria to the standards over what are used in current law. But you have indicated you would prefer neither.

Let us look at my former bill, S. 587. It contained a provision eliminating the current time limits in the act and allowing them to expand according to the size of the record requested.

Assuming we have to have a time limit, do you prefer the current time limit provision in S. 1730 which keeps the 10-day limit but provides for more flexibility or the S. 587 provision which eliminated the current time limit?

Mr. LANDAU. I think we preferred your bill. We thought your bill was a very sensible approach to the problem.

Senator HATCH. I want to personally thank you and credit witnesses from the media such as yourself with encouraging some of these changes. We have changed them because of media presentations here.

I think it is healthy to note the progress that the subcommittee has made toward at least a more ideal bill that would be more pleasing to people in the media, historians, and I might add archival people.

Let me look at another concern. S. 587, my former bill, also contained a 10-year moratorium on all law enforcement records. S. 1730 instead expands a few categories under the seventh exemption to protect informants and State police bodies. We have also made that change as a result of some of the testimony that has been given here.

Mr. LANDAU. It is sort of "out of the fire; back into the frying pan."

Senator HATCH. You media people have such a nice way of putting things.

Mr. LANDAU. You have taken out the 10-year exemption, and we certainly are grateful for that.

I might say, by the way, the administration bill has a curious provision in it which you might be interested in. It gives the Attorney General the right to unilaterally exempt all records involving counterintelligence, terrorism, or organized crime. It looks to me as if they have adopted the total exemption theory for whole categories of records.

You have, as you know, expanded the exemption from records collected for investigatory purposes to all records relating to investigation or any aspect of the crime.

One of the problems we see in it is that in trying to protect local and State governments you say, "any information submitted by local and State governments which it submits as confidential information." That would permit a local police chief, for example, to give something that you and I might not think is confidential; but if it tells the Bureau it must be confidential, then the requester's rights are controlled by the police chief in Provo's determination rather than having a determination made as to whether in fact the information should be kept confidential because it will disclose.

It seems to us to give an awful lot of discretion to State and local law enforcement, because it imposes a condition of nondisclosure based on whatever the decision of some local official—is that right, Randy, in substance?

[Mr. Rader nods.]

Senator HATCH. We have some other provision that I think have made some major changes in the original bills. One of the original bills tried to limit a requester to one topic per year. In S. 1730 we have tried to treat the problem of duplicative requests by only requiring the agency to update information already sent to the same requester.

Mr. LANDAU. I think that is perfectly fair, sir.

I think one of the problems in the bill that you might not be aware of is the provision which says that if it is a matter of public record any place you should require the requester to go and search the public record.

For example, a requester might request out of an agency all lawsuits filed against the agency on a certain issue. The lawsuits might be in 20 different U.S. district courts from Texas to Alaska.

Would it not seem more feasible to simply let the agency duplicate all those complaints rather than have the individual scholar or reporter have to write away to 20 U.S. courthouses and send his $3.25 check and wait for 20 different court clerks to process them?

It seems to me that if the search and reproduction fee question could be settled the agency would have no problem if it is has all the information in front of it with simply supplying the information.

Senator HATCH. I thought you covered the fee charges well in your statement.

Mr. LANDAU. Thank you.

Senator HATCH. We have changed it from the $10 to every requester regardless of the nature of the request to uniformly collected fees throughout the bureaucracy and throughout the Government.

You mentioned quite forcefully that S. 1730 creates a right of privacy for the dead. You are referring to the provision which states, "Law enforcement records constituting an unwarranted invasion of personal privacy of an individual deceased for less than 25 years" would be exempt.

Mr. LANDAU. That is right.

Senator HATCH. In the first place, I would note that this provision only applies to law enforcement records themselves.

Mr. LANDAU. I thought I said that.

Senator HATCH. In the second place, I would note that this is intended to protect the survivors of the deceased.

You can easily understand the implications of a release certifying that your mother was arrested twice on charges of prostitution or something like that. Since it is impossible to identify all the survivors of the deceased individual, S. 1730 instead prevents disclosure of the law records constituting an unwarranted privacy breach for the deceased.

With those limitations in this particular context, would your opinion change at all?

Mr. LANDAU. If you would like to put an exemption in for mothers who were prostitutes and narrow it down to that one category. [Laughter.]

Mr. LANDAU. I think in your bill you stretch it not only for the dead, but you stretch it to "because of intimate detail which might possibly have an adverse effect on a person or his family."

Now, you know that everybody thinks that anything in the press is going to have an adverse impact on himself or his family—anything that is not flattering in any way. I think that is a terribly subjective standard.

"Clearly unwarranted invasion of privacy" seems to be a nice line to draw, but "any adverse impact on a person or his family" really is such a subjective standard that I do not know how a reporter or scholar could argue against it.

Senator HATCH. I see. In regard to privacy and the deceased, it may be that you have raised an important issue here. Maybe it should be limited to felonies, something that really is repugnant, or something that has the inevitable tendency to embarrass or hurt a remaining family member. I do not know, but we will certainly try to work it out.

Mr. LANDAU. With respect to your suggesting that once was a public record conviction can ever be subject to a privacy claim under the FOIA, I think you would find some other voices arguing that question.

Senator HATCH. I do not think that is the suggestion. The suggestion is personal documents that really are in the nature of private documents that might protect successors to the family. It is a tough area, I have to admit; and I think you have raised an interesting point.

Mr. LANDAU. Could you give us an example, sir, of a case that bothers you, where a court has released what you would consider something outside the scope of the act which was intimate and had an adverse impact?

Senator HATCH. Let me ask you another question that I think illustrates it. You had apprehensions about the personal privacy exemption changes. Let me just state a case that actually held that these interests should be protected.

In the *Wine Hobby* case, individuals were listed as making wine in the privacy of their own home. A request for the list of those involved in this unregulated private activity was held by the court to be exempt. The court's reasons were that the individuals could be subject to derision by their neighbors or even subject to break-ins if their names and addresses were disclosed.

I think we could come up with other examples of information about an individual which would not be in a medical or personnel file that might cause an individual great problems if released.

Mr. LANDAU. But I think the important thing there, sir, is that the court treated that as a similar file and did not let the information be released, so that the exemption worked.

Senator HATCH. That is it: The exemption worked. What we are saying is that there may be other areas where the exemption could work too. Maybe it is in the venereal disease area; maybe it is the drug-related areas; maybe it is in drug pushing; maybe in exotic religions—who knows? All I can say is that there may be many areas where a court might decide to protect the privacy of that particular file.

But I have the same problems you do. I think you have raised an interesting issue here, and I want to look at it a little bit more myself.

Mr. LANDAU. Perhaps Mr. Rich might want to add something, because book publishers tend to be subjective because of the extent that books go into personal lives in some great detail. Perhaps the book publishers have more experience with privacy cases than the press.

Senator HATCH. Yes.

Please go ahead.

Mr. RICH. If I may, Mr. Chairman—there was one other observation I wanted to address, and this deals with a statement which was made by Mr. Rose earlier.

Mr. Rose implied or tended to downplay the significance of the act in uncovering or helping expose and further matters which we all concede were of great moment to this Nation.

Without meaning to take issue with Mr. Rose on that issue, I think, from the perspective of the book publishers, many of the certainly more lasting scholarly and historical contributions arise in the context of deliberative study and analysis over a period of years, the very vitality of which has been made possible and en-

hanced by the availability of documentation derived through Freedom of Information Act requests.

I would say that especially in the case of these more permanent and in some respects perhaps in the long term more important contributions to the public debate about this country and its history, the kinds of examples which the Association of American Publishers set forth in its September 24 statement to this committee adequately underscore the importance of not closing wholesale the files of such agencies as the Central Intelligence Agency, as Senator D'Amato's bill would in essence do.

That is just something I would urge this committee to very much keep in mind as it looks across the gamut of uses of the act and how it has really benefited the principles which underlie it.

Senator HATCH. I think you have raised some excellent issues today, and I have enjoyed listening. We have tried to accommodate, as we have tried to come up with what we think may be a necessary reform of the bill.

I think you have raised some issues in addition to those that have been raised in the past, and we will have to look that over and see what can be done.

I suppose we are going to have to—if we are going to have a bill at all—try and come out with some sort of a best version of the Justice Department bill and what we have been working on for this lengthy period of time.

I have a feeling that if we come out with a bill at all it will not be totally pleasing to members of the media. On the other hand, what we do have to try and do is get some balance on this issue.

I have been concerned ever since 1977, when I as a brandnew freshman Senator conducting hearings in which every law enforcement agency in this country of any substance stated that whether informants are disclosed or not, the perception is there that they will be disclosed, and therefore there is a lack of cooperation between Federal and local law enforcement agencies and a lack of informant testimony from which we actually conclude almost every criminal case.

Mr. LANDAU. Senator, I would ask you to cast your mind back to 1966 and the great debate over the *Miranda* decision. Do you remember law enforcement predicting that never would another arrest be made, that they would be hampered, and so forth, and so on? They seem to be able to live.

I think perhaps law enforcement has a mentality that perhaps sees shadows in corners where they do not exist.

Senator HATCH. They seem to think that the media have a mentality that sees shadows in corners that do not exist.

Mr. LANDAU. But we keep going back to the same thing. If Judge Webster could show us a case where a court has told him that he has to release the identity of the informant—just one case in 15 years—if Mr. Casey or Admiral Inman could show us one case——

Senator HATCH. That is not the issue to them. The issue to them is—whether they can show one case or not—foreign nations with regard to the CIA are now stopping their intelligence gathering activities in cooperation with the United States, which is very serious. That is a fact.

No. 2: We have only about 25 percent of the informant testimony that we used to have—maybe 50 percent in some areas, but a definite and decided important drop. Maybe it is just the perception that their identities will be disclosed, but that perception alone has caused a severe difficulty in law enforcement activity.

I might also add that I think those complaints are legitimate complaints.

Last but not least, with regard to the *Miranda* case, having been a practicing attorney who has invoked *Miranda* and fought against it, I can say this: That these criminal procedure rules have, it seems to me, caused an awful lot of difficulties in law enforcement activities in this country, to the extent that there is a very strong push by Senator DeConcini and others, including myself, to make some modifications, if not wholesale changes, in these rules because of the need to have better law enforcement.

I have read even in the newspapers over this last 6 months that we have a tremendously incredible, difficult situation facing us in crime, law enforcement activities, and penal institution changes in this country like never before, to the extent that some of us have just about broken our oars year-in-year-out, trying to come up with a new Federal Criminal Code reform bill which would unify, consolidate, and reform the criminal code, not as much as some of us would like to have it reformed on either side, but in a way that might unify and codify criminal laws, so that at least the citizens of this country and law enforcement officials can understand them for a change.

I suspect that if I were a reporter, journalist, or TV anchorman, I would feel exactly like you do. I see nothing wrong with that and, frankly, commend you for it. I do not blame you for feeling that way, and I do not think anybody here does. But we have to look at this from a little bit different perspective. That is, how can we resolve some of these very apparent problems and still allow the widest, most open society we can possibly have, so that people really will know what is going on?

I have lots of problems with the D'Amato bill, even though I am basically supportive of it. I do not know that any agency in the Federal Government should be exempt from Freedom of Information requests or from examination by investigative journalists, or anybody else for that matter who has a legitimate concern.

On the other hand, we do have some balancing here that some of us feel just has to occur. So let me just end by complimenting you for your excellent statement here today, and you other folks who are here, and complimenting those who have appeared on behalf of journalism and the media. I think you have had an impact on the committee.

All we can do is try to do the best we can to incorporate the best ideas you have in the best possible way into this bill.

Unfortunately, what I have found ever since I have been in the Senate is that you cannot please everybody or really anybody on this bill, including myself. Everybody, except perhaps the media, feels that changes are essential; and you have even admitted today that some of the changes we have put in here are probably for the better; but they are the more technical type changes and procedur-

al type changes rather than the substantive changes that you have, from your perspective, honorably criticized.

What we are going to try to do is that monumental job of trying to pull it all together and hopefully come up with the best possible approach here. We hope that maybe it will be pleasing to many of the folks in your profession as well. But we appreciate the efforts you have put forth.

Mr. LANDAU. Thank you, Mr. Chairman.

[The prepared statements of Mr. Landau and Joan Hoff-Wilson follows:]

Prepared Statement of Jack C. Landau

On behalf of The Reporters Committee and the Freedom of Information Service Center, which we operate in cooperation with the the Society of Professional Journalists, Sigma Delta Chi, I should like to thank you, Mr. Chairman, for inviting us to discuss possible legislative improvements in the existing Freedom of Information Act.

My name is Jack C. Landau. I am the Director of The Reporters Committee and the Supreme Court correspondent of the Newhouse Newspapers. Aiding me in this testimony is Tonda Rush, Project Director of the Freedom of Information Service Center, and Kathy Shwiff, a law student intern at The Reporters Committee from the University of Texas Law School.

INTRODUCTION - The Reporters Committee Interest

As you may know, The Reporters Committee has special experience with the Freedom of Information Act. We have filed several lawsuits litigating issues under it. We daily respond to queries from members of the journalism and academic communities on how to utilize the Act.

In 1974, The Reporters Committee, along with the American Historical Association, the American Political Science Association and nine individual historians, political scientists and journalists filed the original Freedom of Information Act case claiming that President Nixon's 42 million White House documents and tapes were public property covered by the FOI Act. We obtained the original injunction issued under the Freedom of Information Act prohibiting Mr. Nixon from taking possession of these papers as his private property. (See Reporters Committee for Freedom of the Press v. Nixon).

We appeared in this case and in the affiliated case, Nixon v. Sampson, before the United States District Court, the United States Court of Appeals, and the United States Supreme Court. Our counsel participated extensively in the drafting of the Presidential Recordings and Materials Act and then in the General Services Administration regulations on access to the Nixon-White House materials.

Subsequently, we filed, under the Freedom of Information Act, The Reporters Committee v. Kissinger, claiming that the 30,000 transcript pages of Mr. Kissinger's official diplomatic conversations compiled by government secretaries on government time and used extensively by Mr. Kissinger in the performance of his government duties were public records covered under the Federal Freedom of Information Act and were not, as Mr. Kissinger claimed, "private diaries" for his exclusive use only.

The U.S. District Court and the U.S. Court of Appeals upheld our claim, ruling that Mr. Kissinger had illegally removed government property covered by the Federal Freedom of Information Act. However, the Supreme Court, last term, reversed those decisions, stating that Congress had not intended to give scholars, journalists and others under the Federal Freedom of Information Act any cause of action to obtain access to illegally removed government records -- because they were not physically in the possession of the governmental agency.

Two years ago, the Reporters Committee and CBS reporter Robert Schakne filed Reporters Committee v. Civiletti, seeking access to public record criminal justice histories -- arrest, indictment and conviction data in state and federal courts compiled by the FBI. It is our belief that these records, which are part of the public record in various state and federal courts, should be available to the public and press in the centralized, easily accessible form of FOI files rather than requiring a researcher to go through every courthouse and police department in a particular state. This case is pending before the United States District Court in the District of Columbia.

We have also recently been involved in a most interesting case which we will discuss later in which a United States government agency, for the first time, has committed itself through a court consent decree to generally waive or reduce search and reproduction fees for news media personnel seeking information from the agency. This should eliminate one frequently used delay tool -- high search fees -- which sometimes deters smaller news agencies and individual scholars from using the Act. (Freiberg v. U.S. Dept. of Agriculture)

These test cases and others which we have been involved in over the years led to the formation, with the Society of Professional Journalists, Sigma Delta Chi, of the FOI Service Center. It offers prompt, cost-free legal research, advice and litigation assistance to journalists, authors, and scholars wishing to use the federal FOI Act and 49 state open records Acts. In the first year of operation, the FOI Service Center answered 200 letter and telephone inquiries on how to use the FOI laws. In the second year, more than 400 requests were made, and this year we expect more than 600.

Our Committee has expended such an enormous amount of time, effort and money on FOI because we feel very strongly that the FOI Act is one of the fundamental information tools by which our citizens can be informed about and evaluate the decision-making processes of their government.

I. BACKGROUND - The Federal Freedom of Information Act Has Proven Itself To Be An Invaluable and Much Used Informational Tool By The Local And National News Media, The Academic Community And Public Interest Organizations

We and other press groups believe that most of the current efforts in the executive and legislative branches and in the private sector to significantly change the Act, if successful, will cripple it and deprive our citizens of important information about contemporary affairs and historical analysis and research.

I think it is fair to say that virtually every news media organization and association in this country believes that the Federal Freedom of Information Act, in its current form, must be preserved if we are going to continue to adhere to the goal of an informed, self-governing electorate.

A recent Library of Congress study, (Press Notices on Disclosures Made Pursuant to the Federal Freedom of Information Act, 1972-1980: A Compilation) gives some 270 news stories which are examples of how the

public has benefited from the scope of this Act with its presumption that government information belongs to the citizens, unless there is some significant and identifiable harm from releasing it.

For example:

--The Consumer Product Safety Commission released information received by subpoena from a number of major manufacturers about exploding television sets;

--The Department of Health, Education and Welfare disclosed documents showing several American universities receiving federal funds were suspected of misusing those funds;

--The Department of Energy released a study indicating plutonium workers might suffer from increased susceptibility to cancer;

--The Federal Trade Commission made public a study suggesting to consumers that cancer insurance was a "poor buy."

--The U.S. Public Health Service disclosed to The Washington Post that Utah residents suffered an unusually high proportion of birth defects because of atomic bomb testing from 1950 to 1964.

The Library of Congress Study mainly emphasized news stories produced from a small number of nationally distributed publications such as The New York Times, The Washington Post, The Los Angeles Times, The Wall Street Journal, etc. It did not make any effort to show how frequently the Act has become an invaluable and essential tool to local news organizations reporting local stories.

For example, one local news organization, Station WJZ-TV in Baltimore, used the Act 14 times in two years to report on local issues, including:

--A story exposing welfare fraud in Baltimore, using documents obtained under the FOI Act;

--A five part series on General Services Administration leases in Baltimore;

--A story on radioactive wastes stored in Curtis Bay near Baltimore; and

--A story on textbook shortages in Baltimore Schools.

Nor did the Library of Congress Study survey the public interest

community, either locally or nationally, which uses the Act frequently, particularly the environmental movement and the consumer movement. For example, one organization, the Consumers Union, has used the Act more than 12 times in the past several years to discover information about dangerous and widely-used consumer products.

--The organization publicized a study, based upon FOI Act research, on additives in unleaded gas.

--It publicized a study based upon Consumer Product Safety Commission data on hazardous denture cleaners;

--It used National Highway Safety Traffic Administration data to publicize information on the dangers of auto ramps used by consumers when they perform their own auto repairs.

The point here is that dangerous products, dangerous working conditions, polluted local streams and questionable local welfare practices, etc. are everyday local issues which the average citizen has a right to know about. We make this point because the emphasis on the FOI Act is too often couched only in terms of national security and national law enforcement, which we think overlooks the great value it has to local news coverage.

Therefore, we take strong issue with those who cite the General Accounting Office report as being indicative of either the volume of information requested by the press and the academic community under the Freedom of Information Act or the significance of this information. The GAO report shows that less than 5 percent of the formal requests are made by persons who identify themselves as journalists, scholars, authors, and writers -- persons whose intent is to disseminate government information to the general public. But this 5 percent figure may be very low. Because the FOI Act gives access to "any person", competitive journalists, not wanting to tip off the opposition, frequently do not make the request in their own names. News organizations may make their requests in the name of a copyboy or a secretary so as not to reveal their identity.

But more importantly, as even Deputy Attorney General Edward Schmults conceded, thousands of news stories are produced every year because government information officers, public affairs officers and

other officials, knowing they have to disclose it under the FOI Act, voluntarily make information available to journalists, authors and scholars.

A. A FIVE-PRONGED COORDINATED ATTACK TO MUTILATE THE FOI ACT - By the FBI, the CIA, the Executive Branch, the Legislative Branch and the Private Business Sector

We are here today because we believe the coming months are going to see a serious legal and political crisis for the whole future of the federal FOI Act and its underlying premise that records and most governmental decision making should be available to the public. A powerful coalition of government and nongovernmental interests has developed with the overall goal of crippling the Act in a number of significant ways.

This coalition is composed of:

The Administration: It believes in general that the act is too cumbersome, too expensive and allows too much openness across the board. Pursuant to this policy, the Administration has already revoked regulations promulgated by former Atty. Gen. Griffin Bell which encouraged compliance with the Act and has said it is going to submit a comprehensive proposal limiting the existing procedural and substantive rights.

The FBI and the CIA: They argue that the Act poses a danger to their ability to deal with domestic criminal and foreign intelligence informants.

A Large Segment of the Business Community: as represented by the National Association of Manufacturers. This group believes too much information, under the trade secrets exemption, about corporate policies and products decisions is being made public.

The Congress: A small but influential group of senators and congressmen have introduced more than 30 bills including proposals to limit access to business information, significantly exempt law enforcement records and to otherwise cut down on procedural and

substantive rights. One proposal has been made by the distinguished chairman of this subcommittee.

We would certainly concede that there may be minor problems with the FOI Act and that some minor modifications can be made in both procedural and substantive areas. But we also believe -- and this is critical -- that those who seek to restrict the Act have not proven on the public record that any major restrictions or major changes are necessary. This very inability of the critics to show any significant damage to the government is itself the best argument against any significant mutilation.

What I think we are seeing, to a great degree, is a deep seated dissatisfaction by government, private industry and others with informing the public, and this desire for more secrecy is being translated into requests to restrict the Act without any factual showing on a case-by-case basis that these broad changes are justified.

II. THE HATCH BILL AND OTHER PROPOSALS TO SIGNIFICANTLY AMEND THE FOI ACT ARE UNJUSTIFIED AND WILL DESTROY THE CURRENT LAW.

A. LAW ENFORCEMENT -- The Hatch bill will eliminate much public oversight of the misbehavior of law enforcement.

The law enforcement community, headed by the Federal Bureau of Investigation, claims that the FOI Act has burdened or obstructed its ability to utilize confidential informants.

We would answer that the FBI, in 15 years, has never been required by any court in FOI litigation to disclose the identity of a single confidential informant. The FBI cannot point, at least publicly, to a single informant whose personal security was jeopardized because of an FOI Act court decision.

Former Attorney General Griffin Bell apparently submitted to Congress 100 examples of informants who felt uncomfortable dealing with the FBI because they believed -- incorrectly, of course -- that their identity would be disclosed by the mere existence of the Act.

We find it difficult to believe that this Subcommittee or the Congress is going to insulate the FBI from public accountability based on the misunderstandings of the application of the FOI Act by the shadowy world of criminal informants. Certainly the FBI's informant program is hindered by the Fourth and Sixth Amendments. It would be much more comfortable never to disclose the identity of an informant in a criminal trial or in a probable cause hearing.

But public disclosure of informants in criminal prosecutions is essential. If the FBI is able to operate effectively when it is forced to disclose informants under the Fourth and Sixth amendments, it would seem somewhat bizarre legally to exempt it from the FOI Act when it has never had to disclose an informant in court.

Under current law, the FBI has what we think is more than adequate protection under its exemption for "investigatory records compiled for law enforcement purposes." The courts have interpreted this exemption quite properly to apply, with some exceptions, to pending cases. If the investigation is completed, then the documents should be available to the public so it may judge for itself the fairness and thoroughness of federal law enforcement.

S.1730 would exempt many FBI records from coverage of the FOI Act. The Hatch bill would exempt all records -- whether they are investigatory records or records merely "compiled for law enforcement purposes" and in any way "used" for law enforcement purposes. In addition to this double-barreled loophole (the first condition of Exemption 7), the Hatch bill expands the scope of the current exemption from identities of confidential sources to anything which would tend to disclose -- a confidential source.

To give you an idea of the secrecy concepts infecting S.1730, we should like to point to the law enforcement privacy exemption. It would deprive the public of information on the grounds that the privacy of dead people would be violated -- a concept until now entirely unknown in the law.

Furthermore, the Hatch bill exempts information given by state or local governments which those governments claim is "confidential." This creates a broad exemption not dependent on whether the

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information is in fact confidential but whether some local police chief thinks it ought to be kept confidential.

In addition, S.1730 would grant federal law enforcement a total exemption if "there may be persons" -- the number of persons is not specified -- who, with their collective wisdom, could discover something which otherwise might be exempt -- the so-called mosaic theory of secrecy.

Secrecy for the dead. Secrecy for any record which may "tend" to identify a source. Secrecy for the local police chief. Secrecy for all information which if studied by hundreds of nefarious geniuses might in some way jeopardize some confidential information. Mr. Chairman, this is not a minor modification. It is a censorship nightmare for the concept of public oversight of the misbehavior of law enforcement.

Under the Hatch bill, the FBI never would have disclosed that:

-- It supplied the Nixon White House with files about law abiding citizens, such as John Kenneth Galbraith and Dr. Karl Menninger, after they signed an advertisement protesting the Vietnam War;

-- It plotted to defame the character of the late actress Jean Seberg for her involvement with black nationalists;

-- FBI Director J. Edgar Hoover's secretly kept files on persons he considered political enemies of the Bureau;

-- Actively tried to stifle the Puerto Rican nationalist movement.

In fact, Mr. Chairman, what the federal law enforcement community wants is a cover-up statute, which is precisely what this provision provides.

B. <u>INTELLIGENCE RECORDS -- The D'Amato bill will effectively destroy public oversight of the misbehavior of the intelligence community</u>.

The FBI's argument for domestic law enforcement is echoed by the CIA in regard to foreign intelligence informants abroad and by the FBI in regard to counter intelligence informants inside the United States.

The CIA director, Mr. Casey, claims that sources of foreign intelligence are hesitant to deal with the agency because it is covered by the FOI Act.

The CIA has never been forced in any FOI litigation to disclose any "properly classified" information.

Therefore, Mr. Casey says, it is the misperception about our law -- not the operation of the law itself -- which he is trying to correct by exempting his agency from the Act.

Certainly, such a radical departure from the principles of public accountability should not even be entertained before this Subcommittee because some misinformed foreigner, who passes information to the CIA, has an erroneous view of a Congressional statute.

Information about past CIA operations that has been disclosed under the FOI Act told the American public of numerous instances of violations of law. Stories about the agency based upon FOI research include:

--In 1979, the Agency confined the head of a foreign political party to a mental hospital and considered disposing of him because he refused to stay put.

--In the late 1960s, the CIA infiltrated black civil rights groups even though the Agency's own research showed the groups posed no threat to national security.

--In 1977, the CIA released documents showing it had conducted experiments on young boys to determine whether circumcision affected the boys' development.

--During the past five years, numerous stories about the use of mind-altering drugs on unsuspecting human subjects have been published.

The bill under consideration by this Subcommittee, S.1235, introduced by Senator D'Amato, would permit the agency to keep secret just this sort of embarrassing but important information. It would do this quite simply by prohibiting all FOI Act suits against the CIA and would leave it entirely up to the decision of the Agency whether it wants to publicly disclose that its agents are violating the laws and the Constitution of the United States.

Therefore, we oppose S.1235, because it would completely insulate the CIA from any public accountability and destroy the balance that now exists which grants to the CIA extremely broad secrecy powers under the FOI Act but still does require some public accountability.

C. TRADE SECRETS - The Hatch Bill Would Effectively Eliminate Most Access By the Public and the Press to Information Submitted to the Government by Private Business on Such Issues as Pollution, the Environment, Minority Discrimination, Product Safety, Misleading Advertising, etc.

One major substantive provision of S.1730 would be to almost totally exempt records of businesses submitted to the government for regulatory purposes, and if they are not entirely exempted, then to set up a procedural morass as a second line of defense so that the average reporter or writer would give up before he or she began.

Under current law, the trade secrets exemption applies to conventional trade secrets such as customer lists and secret formulas and to confidential commercial or financial information the release of which would cause "substantial harm" to the competitive positions of a corporation supplying the information.

The Hatch bill would broaden this exemption to include any "commercially valuable information" which the supplier believes was "confidential" and which a businessman believes may impair the "legitimate business interests" of his corporation.

Frankly, Mr. Chairman, knowing the mentality of most American business persons, I can hardly think of any internal information, which if made public, a private business enterprise would not consider an impairment of its "legitimate private business interest."

American business is among the most aggressive and imaginative in the world, and certainly has a right to have legitimate trade secrets protected. But when American business is required by law to submit information on how it pollutes rivers, how it discriminates against minorities, how it produces unsafe products, how it misadvertises securities, how it produces hazardous drugs, unsafe automobiles, unreliable tires, and health hazards to its workers, the public has a right to know this information.

The Hatch bill also sets up a prolix and ungainly reverse FOI procedure subjecting individual reporters and scholars to a whole series of countermoves by businesses seeking to suppress publication of its information. Proposed reverse FOI procedures would enmesh the reporter or researcher in a legal battle with the corporation,

subjecting him or her to notices, written objections, ex parte hearings, time extensions, findings of exceptional circumstances and injunctions.

We had hoped that the U.S. Supreme Court decision in Chrysler v. Brown had ended reverse FOI cases under this statute. There is however, some evidence that imaginative corporations are now using the Administrative Procedure Act and the Federal Jurisdictional Statute, 28 U.S.C. 1331, to avoid the prohibitions of Chrysler in an effort to enmesh FOI requesters in unending litigation.

In the interest of openess and uniformity, therefore, we not only oppose Senator Hatch's proposal, but we woud suggest that the current Freedom of Information Act be amended to prohibit any court from barring the release of any information requested under this Act when the suppression request comes from any third party.

Let us take a simple example. A consumer affairs reporter wishes to know safety test results conducted on television sets by 14 manufacturers. The moment he submits his request to the appropriate government agency, he triggers 14 identical paper wars from 14 TV manufacturers, which are likely to exhaust his time and resources long before those of the corporate interests seeking to suppress the information. If you think this example is far-fetched, this is exactly what happened a couple of years ago when 14 TV manufacturers each filed reverse FOI suits in the case of GTE Sylvania v. CPSC. Many of the very worthwhile consumer stories based upon FOI Act release would never have reached the public, had this procedure been in effect for the past 15 years.

Another major complaint against the Freedom of Information Act comes from certain segments of the private business community who believe that too much information about their products and internal policies which they have submitted to the federal government for review under various regulatory statutes, is being provided to the press and the public. Naturally, the information objected to most strongly is information which discloses that the business entity has not been adhering to safety, health, truth-in-advertising and other similar standards enacted in the public interest.

In addition, businesses (who are also the major users of the Act) claim that their trade secrets are being disclosed to the public and are being disclosed to their competitors. As a result, many business organizations have urged that the trade secrets exemption be significantly broadened.

The business community has already received two very broad exemptions within the last 18 months when Congress exempted most of the information submitted to the Federal Trade Commission under administrative subpoena in the summer of 1980 and then gave a similar agency-wide exemption to the Consumer Product Safety Commission last summer. Both of these exemptions were passed over strong objections by press and public interest organizations.

However, a study by a George Washington University law professor -- the only study we know of on the trade secrets exemptions -- comes to the conclusion that industry claims that their legitimate competitive interests have been harmed by the Freedom of Information Act are unjustified. Professor Russell Stevenson could only find two cases out of hundreds of requests in which it could even be argued that a legitimate trade secret was disclosed under the Act. These two disclosures, by the way, were not made in litigation. In one instance, the corporation itself acquiesced to the release of the information only to discover it had made a mistake.

D. PRIVACY - The Hatch Bill Would Extend the Current Narrow Privacy Exemption From Medical and Personnel Information to any Information Which Would Have A "Possible Adverse Effects on any Person or His Family."

Unlike the exemptions sought for law enforcement, the intelligence community and trade secrets, there does not seem to be any organized pressure to expand the privacy exemption.

The current law provides protection against an unwarranted invasion of personal privacy limited to information contained in "medical, personnel or similar files" (meaning intimate personal details).

S.1730 continues this exemption. But S.1730 expands the exemption in two significant ways: First, it adds to "intimacy" an alternative withholding justification -- "possible adverse effects on a person or his family." As privacy is fairly subjective to begin with, allowing the withholding of information based on an additional vague standard of adverse effect on a person or his family would seem to create an exemption which swallows up the law. How is a reporter or author going to argue that the information will not create an adverse effect if a person says it will and his family says it will?

In fact, what the Hatch Bill would appear to be saying is that anything that would be embarrassing or cause personal discomfort to a person or his family could be exempted under the privacy exemption.

We think that the current exemption has proved to be workable, has no large number of organized and responsible critics, and therefore should not be changed.

E. COSTS -- The FOI Act is a Relatively Inexpensive Informational Tool Costing Less Than 5 Percent of the Total Government Propaganda Budget. The Government Costs for Use by Journalists, Scholars and Authors are Only About $5 Million Per Year.

As everyone knows, the most effective way to kill a government program is to take away its funding. In this era of belt-tightening for all agencies, we are not surprised that those who wish to restrict the Act are capitalizing on the momentum of the budget cutters. The figures being thrown around by the administration are in the neighborhood of $50 million per year. But this figure is open to a number of criticisms.

First, many agencies do not like public accountability to begin with and there is some feeling that they may be highly over-inflating their own estimates.

Second, we do not know whether these estimates refer in part to the functions of public information offices all over the government, part of whose job is to answer FOI Act requests. Because the government has always maintained an extensive public information apparatus in every agency which before the FOI Act produced a great

volume of information upon request by the public. We do not know whether figures cited by the administration are in addition to traditional government public information programs or whether the government is making the FOI Act account for functions it has long performed anyway.

It would seem to us that a careful GAO audit should show a more detailed breakdown of 1) costs which can be attributed to FOI Act requests which would not have otherwise been filled, 2) FOI Act denials and appeals 3) costs which can be attributed to routine governmental compliance with traditional public information policies and 4) how this overlap can be apportioned.

There is also a feeling that duplication has developed in the FOI field with layers and layers of bureaucrats reading and re-reading documents requested under the Act. Therefore, one might add to an audit some type of management study to see whether ,in fact, six FBI officials have to go through every document or whether one or two would be sufficient.

Third, even if the $50 million figure is correct, the cost is low for the benefit derived. Approximately 100 agencies have FOI responsibilities, making the average cost about $500,000 per agency. The same year that the Justice Department arrived at its $50 million figure, United Press International conducted a study that showed the government spends from $1 billion to $1.5 billion on public affairs offices. If that figure is accurate--and that study was widely respected--the FOI is costing about 5 percent of the government's overall public relations budget.

But let us take just one agency. The CIA with an estimated budget of $800 million spends something like $4 million a year processing FOI requests, less than one half of one percent of its budget.

The Center for National Security Studies listed some 50 books or articles that had been based entirely or partially on CIA documents obtained under the FOI Act.

Far from damaging the national security of our country, this information has helped our national security. It has informed the public of abuses in the intelligence community and has helped to

remind our intelligence officials that they too must obey the Constitution and the laws of our nation.

But perhaps more importantly, what would the dollar worth be to the American public to stop the CIA from illegally opening its mail? Can Mr. Casey or Admiral Inman put a dollar figure on the harm suffered by victims and their families who were subjected to "guinea pig" experiments? What would be the CIA's budgetary figure be to compensate our constitutional system had the Huston plan been put into effect? Can the CIA put a dollar figure on the First, Fourth, Fifth and Sixth Amendments?

Another way of analyzing this is to take the government's figure of $50 million per year and take the government's estimate that no more than 10 percent of the requests are made by journalists, authors, scholars, public interest organizations and other groups seeking to inform the public. This would mean, by the government's own statistics, that the total cost to the taxpayer for use of the Act by persons who inform the taxpayer is no more than $5 million per year. We think that is a cheap price to pay to insure a continued flow of information.

1. HOW TO REDUCE SOME OF THE COSTS -- Charge Private Commercial Users Who Do Not Disseminate To the Public Full Costs for Use of the Act.

If a careful audit shows there is a cost problem with the FOI Act, several solutions might be explored. Perhaps as many as 95 percent of requesters are corporations or their lawyers seeking information to be used for their own private commercial purposes, rather than to disseminate it generally to the public. Certainly, they should be required to reimburse the government for the full cost of processing their requests. This would mean that the 5 percent of the persons who use the Act for the purpose for which it was intended -- to disseminate information to the public -- could be partially or completely underwritten by the taxpayers because this information is given back to them through the news media, authors, scholars and public interest organizations. S. 1730 proposes to increase costs of using the Act for all users by charging requesters for the time it

takes to review and edit a file, and we would support this proposal for the non-public users of the Act.

One reason why the Act is not being utilized by the press and the academic community with the hoped-for frequency is that agencies frequently charge high reproduction and search fees for locating information sought under the Act. These fees can range up to $60 per hour for computer searches, even when the information is clearly identified and should be quickly retrievable.

While many large corporations and their law firms may be willing to pay thousands of dollars for search and reproduction fees, smaller news organizations, nonprofit public interest groups and individual authors and writers simply do not have the funds.

In addition, a recent U.S. Administrative Conference study has shown that there is no uniform policy for search and reproduction fees, and that they vary widely from agency to agency -- that some agencies waive and reduce fees while other agencies do not. The Act says agencies shall waive or reduce fees in the public interest. It is our position, as we explain later, that Congress has required the government to reduce or waive search and reproduction fees for journalists, authors, scholars and others whose sole purpose in seeking information is to make it generally available to the public. That position was maintained in a recent lawsuit in which we assisted a Wichita, Kan., reporter who brought suit against the U.S. Department of Agriculture. That suit recently resulted in a consent decree establishing that journalists should generally be granted a fee waiver.

We would suggest that Congress set up a special low-cost schedule of fees, based on the statute itself, which says that costs "shall" be reduced or waived if the information sought is in the public interest. We can think of no class of persons whose requests are more in the public interest than reporters, scholars and authors, because their intent is not to keep the information within the files of a commercial organization or a law firm, but to disseminate it to the public.

It is certainly true that the agency -- that is, the taxpayer -- would be underwriting the cost of search and reproduction fees for the

press, scholars and public interest organizations, but they are only 5 per cent of the requesters.. The taxpayer will get this investment back because the information will be disseminated to him or her. Whereas, the taxpayer receives nothing back when the information lies stored in the files of a law firm because this information is being used for the private benefit of a commercial client.

Therefore, we would oppose Senator Hatch's provision in S. 1730 because it would cut back on the requirement that government agencies waive fees if publication of the information sought would "primarily benefit the public."

Under this Bill, the journalist would have to show a "substantial" public interest -- a standard we think is somewhat higher than the existing fee waiver standard of merely benefiting the public. In addition, we think that the standard of a "substantial" public interest allows the government to determine whether the information sought would be of value to the public; whereas in the current standard we have argued successfully that if the information is to be made public, then it is primarily benefiting the public and the government has no business deciding whether or not the information is of value.

In addition, the Hatch Bill might be interpreted by some persons as denying reductions and waivers for any press or academic endeavor which has any profit aspect to it, such as a for-profit newspaper, an author who has royalties, a researcher under a grant, etc.

This is because the Hatch Bill would use as one factor against fee waivers the existence of "commercial or any other private interest." Tnat is not, it seems to us, consistent with the main thrust of the Act which is the publication of information for the benefit of the general public, regardless of whether the publication is for profit or not.

F. TIME DELAYS

A major administration complaint and one that is reflected in several of the bills pending before Congress involves complaints by the agencies that the 10-day time limit is too short, especially in view of the heavy demand made on certain agencies such as the FBI, and the State and Defense Departments.

As a result, the agencies tend to respond to the requests on a first-come,first-served basis and some agencies are so overloaded that they take months to respond. This long response time has tended to discourage the press and scholars from using the act.

While a law firm or business organization may be willing to wait four or five months to obtain information for litigation, for most news organizations and scholars, public interest organizations and political groups, timeliness is an important factor and these long delays discourage use of the Act.

1. How to Stop Long Delays and Ease the Government's Burden.

S. 1730 attempts to deal with the government's complaints about time limits by increasing the numbers of circumstances in which an extension, from the current 40 days to 60 days could be granted. The Act was intended to facilitate public information. For example, it provides that FOI lawsuits of whatever nature should be given preference over other pending litigation in the U.S. District Court.

Therefore, we would support retaining the current 10-day period for that 5 percent of the requests which the government says comes from the press, authors, scholars, etc., and processing these on a priority basis. We would support Senator Hatch's proposal to extend the time limits for private, non-public commercial users.

Rather than extend all time limits, we would suggest that persons who are seeking information with an intent to disseminate it to the public -- journalists, authors, scholars, public interest groups and political organizations -- should be given a statutory preference over persons and corporations seeking information for their private use. This would mean that big business and big law firms would have to wait longer so that the law's concept of prompt public information would be served first.

Of course, if there is an emergency in a lawsuit, for example, certainly some provision should be made to grant expedited treatment even for private commercial uses, but in general we think there should be a presumption in favor of public, rather than private information.

2. No Penalty for Delays Based on Illegal Withholding

A second reason why the Act is not being used by the press and scholars with the frequency with which we had hoped is that the government may illegally withhold documents, lose in court and pay no penalty for its illegal behavior except attorneys fees.

Because much of the information which the press seeks is potentially embarrassing to the agency, under the current situation, the agency risks nothing by making an illegal determination. Perhaps, the reporter will never sue because he does not have the money to retain counsel and cannot afford to pay a fee if he is unsuccessful; or perhaps the reporter can not wait a year until his suit is finally decided.

Therefore, it's a "heads-I-win, tails-you-lose" situation for the government. It only encourages violations of the Act in a wholesale manner. Reported cases show that the government loses more than half of the litigated cases, either because the court rules against the government or because, after the lawsuit is filed, the government capitulates and provides the information.

While a $1,000 or $2,000 fee may not seem much to a large corporation or its law firm to litigate an FOI Act case, it is quite enough to discourage most smaller news organizations and individual writers, historians and researchers.

3. How to Stop Illegal Withholding

It is our suggestion that the time has come for Congress to amend the Act by setting up a system of nondiscretionary fines for illegal withholding information. We think that Congress should take some action encouraging the government to obey the law because, as I pointed out earlier, it pays no penalty for illegal suppression of information. We would suggest the approach of the Omnibus Crime Control Bill of 1979 where the government pays a statutory fine of $100 a day from the time the illegal wiretap is put on until the time the illegal wiretap is taken off. We think that a statutory fine of $100 a day from the time the information is illegally refused until the time the information is supplied would be a good first step.

However, noting the frequency with which the government wastes millions of dollars, a higher fine might be in order.

When the 1974 amendments were proposed to the Freedom of Information Act, a similar complaint was voiced - that the government official who makes the illegal determination to suppress the information, pays no penalty for his action and this can only encourage massive violations of the Act because there is no inducement to be law-abiding.

There was, however, extreme opposition by government employees to any suggestion that they should be personally liable for fines if they violate the law, believing for some reason that the rest of us should have to pay fines for violation of the law, but that they (by virtue of their employment) are exempt from obeying the law. As a compromise alternative, a provision was inserted in the Act saying that if the withholding is in bad faith, then the United States District Court could recommend that the Civil Service Commission institute punitive proceedings against the offending government servant.

As far as we know, in the hundreds of FOI Act cases lost by the government, there has only been one referral to the Civil Service Commission and this has lead to no punitive action. So this compromise has turned out to be no compromise at all but a total victory for secrecy and violations of the Act.

G. UNAUTHORIZED REMOVAL OF GOVERNMENT DOCUMENTS: THE REPORTERS COMMITTEE V. KISSINGER

As you may know, when Mr. Kissinger left the State Department, he took with him what many people consider the most important documents ever amassed by a Secretary of State. They are the 30,000 verbatim transcript pages of his official diplomatic conversations as Director of the National Security Council and as Secretary of State. These transcripts were made by tape recorders attached to his telephone or by secretaries who listened in on his calls. They were recorded by government employees working on government time and were used frequently in the performance of official government business.

Believing these documents to be owned by the public under the

Freedom of Information Act, The Reporters Committee, the American Historical Association, the American Political Science Association and ten well-known journalists and scholars filed suit for access to these documents. Because the documents had already been removed from the State Department and had been deposited in the Library of Congress, under conditions where only Mr. Kissinger has access to them for years, The Reporters Committee sought an order requiring the State Department to retrieve these documents; or in the alternative, an order that Mr. Kissinger cancel his agreement with the Library of Congress and return these documents to the State Department.

Both the United States District Court and the United States Court of Appeals ruled that Mr. Kissinger had illegally absconded with government property and ordered that the documents be returned. The United States Supreme Court, however, ruled that the FOI Act does not give to any member of the public or the press any standing to file a lawsuit under the FOI Act even for documents illegally removed from government offices. As a result, the Court did not have to deal with the theft question. It did not overturn the determination of two lower courts that Mr. Kissinger had stolen government property.

Now this is truly an outrageous situation. Under this ruling, any government employee can abscond with government documents and there is nothing that any member of the public or the press can do to force their retrieval, even if there is evidence -- as there is in this case -- that there was collusion between the Administration in office and the official who removed the documents. The public and the press are helpless to obtain its property. Certainly, any review of the FOI Act should correct this abuse.

1. How To Stop Unauthorized Removal of Public Documents

A bill introduced by a member of the House of Representatives, Rep. Ted Weiss, would correct the problem by establishing a private right of action for any citizen to recover stolen government records. The bill is a direct response to the Supreme Court decision and, we think, a wise one.

H. INFORMATION COMPILED BY GOVERNMENT CONTRACTORS: FORSHAM v. CALIFANO

One phenomenon of government is the increased use of private consultants and contractors to perform government functions -- in policymaking, research and in the providing of services. Recently, the Supreme Court ruled that a shell corporation -- established for no other reason than to perform a wholly funded government research project -- did not have to permit public and press access to its documents under the FOI Act, even where, as in this case, the contracting government agency had guaranteed its own access to this shell corporation's documents as a condition of the government grant. It has recently been disclosed, for example, that 90% of the $11 billion budget of the Department of Energy goes to contractors and consultants and that a survey of 2000 cities showed that 90% of them have used consulting firms at least once in the last two years, and that some of them have used consulting firms as many as 400 times.

It is simply inconceivable that the Congress, when it passed the Act, meant to exclude from the purview of public and press documents amassed by government contractors and consultants performing government services on the government payroll.

We now have the situation where research, for example, into a local school problem involving learning disabilities is releasable under the FOI Act if done by an employee of the Department of Education, but is not releasable if done under a contract by the Department of Education with a so-called private consulting firm.

1. How to Retain Public Access to Contractors' Records

This problem could easily be corrected by Congress' defining as agency records those records of contractors and consultants who are federally funded so the work done by them and paid for by the taxpayer could be used by the taxpayer.

I. THE B-3 EXEMPTION LOOPHOLE

When Congress passed the FOI Act, it passed the B-3 Exemption in an understandable effort to incorporate into the FOI Act a few

existing laws maintaining the privacy of government records without having to rewrite dozens of different statutes. But we now have evidence that over the years, quietly, special interest groups have gotten dozens of new back-door exemptions into the FOI Act through the B-3 approach. While some of these exemptions predate 1966, we now know of nearly 150 such exemptions to the Act.

Some of these exemptions have been limited and some have not. But a true morass has been created from the original B-3 limited exemption situation. Under the circumstances, we think that Congress should eliminate the B-3 Exemption entirely because the other eight exemptions for national security, trade secrets and law enforcement records, etc. are quite sufficient to protect the government's interest. If this B-3 Exemption craze continues, the exemptions are certain to swallow up the Act. A prime case in point is last year's B-3 Exemption for the FTC, This in fact grants the FTC a virtual exemption from the FOI Act, once again through the back door. Two more instances occurred this past summer with the exemption of the Consumer Product Safety Commission and the Internal Revenue Service. We hope, at the very least, that this subcommittee would assert jurisdiction over all amendments, direct or indirect, to the FOI Act to give a fair hearing to those both favoring and opposing changes.

In conclusion, we would respectfully say that the leading FOI bill in the Senatee -- introduced by Sen. Hatch --- is, in most respects, an across-the-board frontal assault on public access to government information as we now know it under the federal freedom of information act. If passed, it will encourage inefficiency, illegalities and cover-ups by governmnet bureuacrats and high officials in the law enforcement community and in the government regulatory agencies because it will shut down the public information necessary to monitor these government activities. Sen. D'Amato's bill will do the same for the CIA by censoring all information now available from that agency.

We think that some modest changes might be in order and we would be pleased to discuss them further. I hope this answers most of your questions, Mr. Chairman, and on behalf of The Reporters Committee and the FOI Service Center, I thank you for your time.

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Prepared Statement of Joan Hoff-Wilson

My name is Joan Hoff-Wilson. I am Professor of History at Indiana University, Bloomington, and Executive Secretary of the Organization of American Historians (OAH). I appear today on behalf of this national group because American historians are those most concerned within the historical profession about access to records and documents of federal, state and local officials and agencies. Last spring my predecessor, Richard S. Kirkendall, as head of the Organization of American Historians, testified before one Senate and two House committees[1] stressing the specific use historians have made of the Freedom of Information Act (FOIA) to produce scholarly books and articles. I refer you to his testimony for precise references to past examples of constructive employment of the FOIA by members of both the Organization of American Historians and the American Historical Association.

Today I want to concentrate on the importance of the FOIA as amended in 1974 for historians in general, but particularly for those historians who have committed themselves to the social responsibility of writing about contemporary events, that is, the recent past. I believe that historians of contemporary events provide an invaluable service to the country by providing a scholarly perspective on the recent past and that their interests are currently being ignored or undermined by those members of Congress suggesting drastic revisions in the application of the FOIA.[2]

It is particularly disturbing to realize that the most restrictive amendments are being offered by members of the same party as the president who is personally committed to open government and to the public's right to know. Even the FOIA's strongest critics agree that this was the original intent of Congress when it first passed the act in 1966 and amended it in 1974, namely, to "empower individuals to hold government

accountable for its use of sensitive information," and to communicate necessary government information to the electorate. Thus, "Congress sought to insure that our citizens would be permitted to discover what records the government keeps on them and how that information...would be used."[3] Historians and scholars in general have honored that commitment and should not be punished because they constitute "only a tiny fraction of the requests for disclosure." Because scholars interpret government decisions affecting individual citizens and national policy, they may be the most important users of the act even though they are few in number compared to commercial and juridical users.

Suggested limitations on the amount of time needed to process requests and arguments over the expense of processing requests are not only often based on a misperception about the actual cost effectiveness of the FOIA in eliminating wasteful and corrupt government practices, but they also do not focus on the heart of the administrative problem which lies inside various agencies. Why is it that the Department of Defense has one of the most efficient and least costly records of processing while the CIA has one of the worst from the standpoint of the individual scholar? To date, most cost-benefit analyses have served simply as a smokescreen to avoid the major issues of the FOIA's role in promoting open, accountable government and the lack of well-trained processing personnel within certain agencies as opposed to others.

This committee would perform an invaluable public service if it would recommend both a GAO study of the real, as opposed to hostilely inflated, costs of FOIA operations and examine the practices of certain state FOIAs (most notably the one in New York) as potential models for improving administrative efficiency, rather than assuming that only arbitrary limitations on requests can solve agency backlogs.

Currently, the three major areas of concern over the operation of the FOIA are law enforcement and intelligence; trade secrets; and administrative costs and other processing procedures. The

first is of greatest importance to historians. We have opposed any further exceptions for either the FBI or CIA. Several members of the OAH, for example, are plantiffs and amici curiae in AFSC v. Webster, a lawsuit still before the courts, designed to assure that the process of selecting documents to be retained for use in the National Archives of FBI files, be based on the broadest possible definition of historically significant material and on open access to government documents. And we have testified and written in opposition to amendments like S. 1235 (D'Amato) granting a blanket exemption to CIA documents.

If the CIA is granted this privilege, how can it be denied to other agencies? It is not likely that the National Security Council, the Defense Department, or the Department of State, would be willing to take second place in a race to close files and thus subvert the Congress's intention in passing FOIA. Moreover, the Advisory Committee on Historical Diplomatic Documentation has opposed the notion that foreign-originated information should not be declassified on schedule. Yet volumes in the Foreign Relations series already compiled, some even in galleys, have been recalled to expunge up to 15 to 20 percent of documentary material, even including conversations with foreign ambassadors. This series is the best of its kind in the world. It will be a tragedy for diplomatic historians and diplomatic history if this delay in publication continues.[4]

My own research has been in three distinct areas of American history and in three equally distinct time periods. My fields of specialization are -- colonial legal history, foreign economic policy since 1920, and now the Nixon presidency. This variety of historical research has brought me into contact with government officials, archivists and other historians at the federal, state, university, and local levels. On the basis of this experience, I would like to make the following points. More than ever before there is a greater need to facilitate and encourage academic and independent historians to engage in

the writing of contemporary history. Because of widespread public interest in contemporary events and the country's tremendous technological capacity for disseminating information, the need to produce scholarly, accurately documented political and socio-economic history is urgent for several reasons. Mass means of communication do not simply inform. They also shape ideas and attitudes.

Beyond any doubt, the writers of contemporary history are in extremely influential positions. Their interpretations can and do have immediate impact on the public opinion, as well as on the minds of public officials. For this reason alone it is in the best interests of the country to have its contemporary history written on the basis of as much nonprivileged information and professional responsibility as possible. Attitudes formed today influence policy decisions for decades to come, and such an important task should not be relegated by default to those who would exploit it for sensational, litigious, or monetary reasons.

Historians have always deferred to political scientists when it came to writing contemporary history. Since Watergate they have been deferring to journalists, lawyers and convicted felons. In attempting once again to perform this public service task of writing contemporary history, academic and independent historians cannot function effectively without the assistance of equally responsible, present-minded archivists and those working to preserve the history of various agencies of the federal government.

Among other things this means that those who conduct public business, whether they function in the private or public sector, occupy positions that limit their "right to privacy" to basic minimum standards. The fact that these same public officials, especially if they are elected, often "use" aspects of their private lives to promote positive images of themselves among the electorate further negates their later claims to extensive rights of privacy or to restrict the use of their official public

papers on the grounds that they are private or personal. Also, standards for distinguishing public from private papers become less clear and more misleading as archival criteria the higher the office or position occupied by the individual in the conduct of public business. I believe this to be the case whether that person is in any of the three branches of government or in influential private corporations or other institutions that affect public policy and decision-making at the national level.

Much of the disagreement and confusion over what constitutes the difference between public and private papers is perpetuated, in part, by many government officials, lawyers and archivists who continue to promulgate the legal fiction that there is a constitutionally guaranteed right to privacy which all citizens are equally entitled to invoke.[5] The right of privacy is not guaranteed by the Constitution, but by an ambiguous combination of legislation and court decisions. It is a very complicated legal and statutory question to which judicial preference has been applied primarily in cases involving marriage, procreation, contraception, and similar personal, family matters.

In fact, the Supreme Court as recently as 1976 cautioned against confounding this judiciai interpretation of the right of familial privacy with public matters such as the papers of national figures.[6] In one case the Justices specifically stated that there can be no "legitimate expectation of privacy" attached to the records of those conducting public office.[7] The 1980 Supreme Court decision on the Kissinger papers notwithstanding, there is not constitutional or judicial authority that allows private citizens to control public property or to regard public property as personal property. Attorney General Civiletti said, after hearing the Kissinger decision, the FOIA should cover "public records maintained on public time on public paper in public buildings by public employees."[8] He did not believe a government employee could "have a personal interest in developing source material for writing memoirs on public time or with

public effort." As a specialist in foreign economic policy, for example, I believe that these criteria should apply equally to leaders and important functionaries in the private sector, as well as those in the three branches of federal government, if we are to determine the systemic influence of economics in the formulation of public policy.

This brings me to another major point about new methodological approaches in the writing of history that have emerged in the last two decades. Both historians of the recent past and of more remote periods are increasingly attempting to determine networks within public and private bureaucratic structures that have an impact on the decision-making process. Similar "network" research is providing invaluable insights into the neglected lives of women and minorities. Such research not only often requires training in interdisciplinary techniques, but also requires access to position papers, in-house memoranda, private correspondence, telephone logs, appointment books, and generally to the types of material often referred to as the so-called "private-official" records of public or private invididuals in the particular financial, bureaucratic, community, or family structure being researched. Networks and patterns of influence cannot be accurately described or understood without such detailed data except by speculation or innuendo based on inadequate, often biased and limited available information.

Network research does not mean that archivists and Federal historians face the hopeless task of endlessly collecting more and more contemporary material. It does mean that they must be acutely aware of the special type of material required by this and other innovations in historical methodology. The new sensibility required to locate, preserve and quickly process information about the powerless groups in America's past and present, namely, women and minorities, is another urgent professional responsibility of the archivist and historian engaged in documenting contemporary society. Unlike networks of power

which allow for considerable selectivity in the preservation process, networks of the powerless necessitate seeking out less obvious and untraditional data. However, as I have already noted, adequate data for documenting even the networks of the powerful cannot be obtained through FOIA.

I am naturally interested in the final outcome of all remaining litigation on all Watergate and wiretap related matters. However, my research in the non-contemporary field of colonial legal history has also made me aware of what is a great concern to all legal historians, namely, the severe restrictions on judicial "working papers." Because individual legal judgments are usually so inadequate for historical analysis, the working papers of judges and their clerks or assistants at all levels of the judicial system are extremely important. This type of information is almost entirely denied to contemporary legal historians, except in those few cases where the individual justices have voluntarily made such papers available. Restrictions exercised by Congressmen over their own papers and Congressional committee records are even more extensive and arbitrary.

These are but two of the most extreme examples of limitations on access to documents that have made it difficult if not impossible for responsible and concerned historians of contemporary events to accurately understand the all important decision-making process within public and private institutions. The papers of some federal agencies and Congressional committees are not only denied to contemporary historians, but many of those groups within the area of internal security employ classification systems and separate filing procedures that will prevent historical investigation even at some distant time in the future. This is because they are not required to keep any record of what documents have been destroyed.

Again, let me stress that a country which is increasingly dependent upon, or influenced by, mass dissemination of informa-

tion cannot allow that information to be subject to the whim of those who want to profit from the exploitation of the lives and activities of important public and private officials, or those in high positions who would arbitrarily permit access to only those records that they have sanitized to insure a particular type of historical posterity for themselves, or to excessive donor restrictions that all too often are encouraged by archivists in the accession process. The more open historical records are, the better informed we all will be about our nation and our public leaders. Even before the controversy over the Nixon papers and tapes, the Supreme Court had held that "the final judge of the proper conduct of public business"[9] is the American public and there is no other way to judge the actions of political, judicial and financial leaders except through access to all but their most private nonpublic papers.

My work on the presidency of Richard Nixon has convinced me, therefore, that the Freedom of Information Act as amended in 1974 serves best the interests of businessmen, felons, lawyers and journalists in pursuit of isolated facts and not those of the historians seeking broad perspectives. Such scholars' needs would be better met by the automatic declassification of a large volume of documents. Nonetheless, I want the FOIA as amended preserved and think that Congress should not approve any more agency exemptions to it, especially those requested on behalf of the CIA. But its importance to the majority of historians in the field of contemporary history should not be placed on a par with, nor used as a substitute for extensive declassification of materials.

Historians and scholars in general constitute one of our most precious national resources. However, they cannot function as constructive interpreters of the recent past unless they have access to information. In lieu of more lenient automatic declassification procedures, the FOIA remains, in some instances, the only tool available to the socially responsible researchers in pursuit of establishing the most accurate record of public

policy as quickly as possible. Constitutional democracy, especially under the "new" federalism of President Reagan, cannot function without a properly informed electorate. Historians can and should provide the reflective perspective necessary for more than "headline" knowledge of domestic and foreign affairs. But they cannot with a FOIA crippled by amendments based on faulty perceptions of how it has functioned to date and short-sighted suggestions for limiting its legitimate use.

FOOTNOTES

[1] Senate Select Committee on Intelligence, March 25, 1980; The House Permanent Committee on Intelligence; April 22, 1980; and Subcommittee on Government Information and Individual Rights; May 29, 1980.

[2] In particular I am concerned about the impact of S.1273 (Dole) and S.587 (Hatch) on historical research into the recent past and suggestions for further exempting the FBI and especially the CIA from the jurisdiction of the FOIA, such as S1235 (D'Amato) and S1273 (Chafer).

[3] Quotes from address by Senator Orrin G. Hatch to the ABA Section of Administrative Law, May 11, 1981 and address by Edward C. Schmults, Deputy Attorney General of the U.S. to the Second Circuit Judicial Conference, May 9, 1981.

[4] The delay in the publication of twenty volumes for the 1950-1954 period is the result of a policy of re-review instituted by the Department's Classification/Declassification Center (CDC). This office was established in November, 1978 and given responsibility both for "mandatory declassification review" including FOI Cases and for "systematic declassification review." The latter is the function at issue because CDC deals with information selected for inclusion in the Foreign Relations series as an aspect of its central responsibility in connection with systematic review, namely drafting of guidelines for use at the National Archives. In other words, the prime role of the CDC is not to declassify documents as an aspect of systematic review but rather to draft guidelines for the use of reviewers at the National Archives. To accomplish its task of devising guidelines, the CDC reviews a sample of information made available to it by the Office of the Historian and recommends declassification action. This sample is also the gross body of information selected by the Office of the Historian that might be published in the Foreign Relations series. Thus, the CDC acts for the concerned geographic and substantive bureaus in declassifying materials selected for inclusion in the Foreign Relations series.

The CDC was directed to begin work with the records covering 1955 and after. However, on the basis of its early activities, it decided unilaterally that it was necessary to revoke the clearances for the remaining twenty unpublished volumes covering 1950-1954, some of which were already bound, nearly bound, or in advanced page-proof status, and undertake a re-review of all the documents in those twenty volumes. The reasons for this decision were: that the concerned bureaus had conducted an inadequate declassification review of information selected for the 1950-1954 volumes in the Foreign Relations series, and that failure to withhold this information would endanger national security; and that certain other information pre-

viously deemed desensitized had become "resensitized" because of altered international circumstances and that its release would endanger national security. This re-review, scheduled for completion by November of 1980 has caused significant delay in the publication of the Foreign Relations series, resulted in significant extra cost to the government, and delayed the expeditious transfer of the Department's records for 1950-1954 to the National Archives, where they would be made available to the public. Moreover, the decision appears to be inconsistent with the spirit as well as the substance of Executive Order 12065 concerning classification and declassification issued in June, 1978, which was clearly aimed at a more rapid, open, and expeditious clearance procedure.

While the Committee expressed understanding of the need to safeguard security, it felt, after discussion of material which had been excluded on re-review, that the process produced little if any benefit in that regard. This was evident because much of the material excluded in the process of re-review was already in the public domain, and because the substantive content of the excluded material could easily be replaced - as was done - by already published material of the same content. In such circumstances, security could hardly be a relevant consideration. The chief result of the process of re-review thus seemed to be a very substantial diversion of time and money, an increase in administrative burden, and an eventual delay in publication with no perceptible benefit in end result. It is hard to believe that such a procedure is useful.

The Advisory Committee also agreed, on examination of the results of the process of re-review, that it was not likely that the process would be less costly in the future, or would have more substantial benefits. The Committee felt that, especially as the documents in question are all at least twenty years old, and will have passed through a preliminary screening by competent and conscientious officials before being offered for declassification, the presumption in favor of openness ought to be strong.

The Advisory Committee therefore urged that the Department of State re-examine and where necessary revise the process of re-review of already cleared documents, with the objectives of: maximizing prompt publication, as being relevant to that open consideration of diplomatic history which is essential to a free democracy; giving realistic consideration to questions of security in the light of a full knowledge of what has already been published elsewhere, as well as the present security implications; and achieving a full and accurate publication of documentation, at the earliest date feasible. The publication of the Foreign Relations volumes at the twenty year line during the 1960's and the subsequent opening of unpublished documents at the National Archives enabled American scholars to produce numerous works of high quality on the record of American diplomacy during World War II and the immediate postwar period. The volumes for the 1940's were thorough in documentation and there is no evidence that their publication led to any security problems. The tradition of publication of the volumes at the twenty-year line, strongly supported by Presidents Kennedy and Nixon, the intent of Executive Order 12065, and the need for access to historical documentation if the democratic process is to function effectively, all serve to reinforce the presumption for openness.

[5] Even the Privacy Act of 1974 is of limited application and provides only statutory, not constitutional, protection to individuals. The "right to privacy" is almost always used out of legal context by a wide variety of people who fear that a "violation" of this presumedly dogmatic right will endanger national security, have a "chilling" impact on future acquisitions, unnecessarily hamper adequate documentation of decision-making processes or actually interfere with that process.

[6] Paul v. Davis, 424 U.S. 693, 712-713 (1976).

[7] United States of America v. Miller, 425 U.S. 435, 440, 442 (1976).

[8] Quoted in AHA Newsletter, October, 1980, p. 2.

[9] Cox Broadcasting Corporation v. Dohn, 420 U.S. 469, 495 (1965) and New York Times v. Sullivan, 376 U.S. 254 (1964).

Senator HATCH. With that, we will recess these hearings.

[Whereupon, at 11:40 a.m., the hearing was recessed, to reconvene at the call of the Chair.]

FREEDOM OF INFORMATION ACT

THURSDAY, NOVEMBER 12, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:15 p.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch, Grassley, and DeConcini.

Staff present: Randall Rader, counsel; Steve Markman, general counsel; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. I apologize for being just a little bit late. We were hosting a foreign policy meeting of the Senate Steering Committee which I was chairing.

This is the 6th and final day of hearings to consider amendments to the Freedom of Information Act. During the course of these six hearings, we will have heard the viewpoints of over 40 witnesses representing newspapers, law professors, practicing attorneys, public interest groups, Government agencies, and a wide variety of other interest.

This has been a rewarding and informative process. It has also been a process marked by much openmindedness and change. As the subcommittee has conferred with its witnesses and the Reagan administration, it has altered many of its original proposals in favor of more workable alternatives.

Today we hope to examine the progress that has been made to date through this 5-month hearing process and discuss further accommodations that might make the Freedom of Information Act far more workable and efficient.

Our inquiry today will focus on two bills, S. 1730, the bill which the subcommittee will use as its vehicle for markup, and S. 1751, the bill prepared by the Reagan administration after consulting with nearly all agencies of the Federal Government.

Both of these bills recognize certain basic principles. For instance, both bills recognize that Congress was extremely shortsighted in 1974 when it estimated that the costs of implementing FOIA governmentwide would be no more than $40,000 to $100,000. Instead, the Freedom of Information Act has become a multimillion-dollar Government enterprise. Accordingly, in an era of budg-

etary pressures, both bills seek appropriate ways to assure that a user will generally reimburse the Government for the value he receives.

In another context, both bills recognize that certain vital governmental functions, specifically law enforcement and national security intelligence-gathering functions, could be impaired by complete openness. The key is to fashion FOIA's exemptions so as to protect these vital functions without destroying all citizen access to public records. Both bills also acknowledge a private property right in information submitted to the Government by a business or private party.

In fashioning the fourth exemption to protect such confidential business information, the House, in its committee report, stated that, "All information given to the Government in confidence whether or not involving commerce or finance" should be exempt.

The Senate report stated that all "information not customarily released to the public by the submitter" should be exempt. This clear intent for broad protection of confidential business information has not been respected by the courts. Accordingly, both bills try to bolster the protection given to trade secrets and other commercially valuable information.

It is historically significant that our first witnesses for this final day of hearings will represent the Society for Professional Journalists and the American Society of Newspaper Editors. The society's 1958 report on incidents of Government secrecy was the factual basis for the first Freedom of Information Act bills introduced in 1960 and 1962. In fact, both societies worked on the first draft of the Freedom of Information Act prepared at the Northwestern School of Journalism in 1960 by Jacob Scher. It is only fitting that these societies play a pivotal role in this phase, hopefully the final phase, of improvements in the act.

It is my pleasure to welcome to this subcommittee this afternoon a panel of distinguished media representatives. Our first witness to present her statement will be Ms. Jean Otto, the editorial page editor of the Milwaukee Journal.

Ms. Otto is the immediate past president and, may I add, the first woman president, of the Nation's oldest and largest organization of journalists, the Society of Professional Journalists, also known as Sigma Delta Chi.

Following Ms. Otto, we will hear testimony from Mr. Charles Rowe, editor and copublisher since 1949 of the Freelance Star, the daily newspaper of Fredericksburg, Va. He is a member of the board of directors of the Associated Press, the American Society of Newspaper Editors, and the Virginia Press Association. He is also the former president of the Associated Press Managing Editors Association. He is appearing today on behalf of the American Newspaper Publishers Association, and we feel privileged to have Mr. Rowe share with us his experience with the Freedom of Information Act before the subcommittee.

Our third panel member is Mr. Edward Cony, vice president for Dow Jones & Co., Inc. He is the former managing editor and executive editor of the Wall Street Journal, which is a publication of news for Dow Jones & Co., Inc. Today Mr. Cony is representing the American Society of Newspaper Editors.

We look forward to hearing from you, Mr. Cony.

Our final witness on our panel will be Mr. Ernie Ford, the managing editor of KSL-TV News, an affiliate of CBS in Salt Lake City, Utah. He is also the director of the Pro-5 Investigative Unit, which has been awarded the National Society of Professional Journalists' Award and the Distinguished Service to Journalism Award for a documentary on nursing homes entitled "Out of Sight, Out of Mind."

Mr. Ford is the chairman of the Freedom of Information Committee of the Society of Professional Journalists and past president of the Utah Society of Professional Journalists. We look forward to hearing from Mr. Ernie Ford. He has taken a great personal interest in this and has given the subcommittee a great deal of very thought-provoking information, some of which is now contained in at least one of these bills.

We are grateful to have you here today, Ernie.

I would like to express at the outset of your testimony, Ernie, my personal appreciation for the help you have provided to me personally during this process. Your lengthy letters as well as several telephone conversations with our subcommittee counsels and meetings with me personally have helped the subcommittee and me with regard to our recommendations.

We may not agree on every point you have made, but you are largely responsible for many of the improvements that we have made.

I have to make those comments because every time I go to Utah I do not want to face Ernie on the other side of that camera.

I would also like to acknowledge Senator Grassley from Iowa.

Senator, do you have an opening statement you would care to make at this point?

Senator GRASSLEY. No, thank you.

Senator HATCH. Then at this point we will begin with Ms. Otto.

We are delighted to have you here.

STATEMENT OF JEAN OTTO, REPRESENTING THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ACCOMPANIED BY BRUCE W. SANFIELD, COUNSEL

Ms. OTTO. Thank you.

At the outset, Mr. Chairman, thank you for your willingness to schedule an additional day of hearings on the proposed amendments to the Freedom of Information Act.

I think perhaps you have explained the division of labor here on our panel today. Again, I represent the Society of Professional Journalists, Sigma Delta Chi, as its immediate past president. Bob Schieffer of CBS News had been scheduled to testify here today but because of the Space Shuttle launch at Cape Canaveral was unable to be here.

The Society of Professional Journalists, the oldest, largest, and most representative organization of journalists in the United States, is holding its annual convention here in Washington now.

Senator HATCH. That seems pretty convenient.

Ms. OTTO. Yes, it does. It was very nice of you.

Thirteen hundred delegates from all over the Nation are participating in the official deliberations of the society, including formulation of the society's policy positions on the various amendments to the FOI Act that we will discuss here this afternoon.

As you know, Mr. Chairman, the society's counsel, Bruce W. Sanford of Baker & Hostetler here in Washington, who accompanies me here today, has been working with Mr. Rader and other members of your staff for the past several weeks.

Because of the society's national convention deliberations, we ask your permission to provide you with our written and detailed analysis and commentary on the proposed amendments to the FOI Act after our national board and officers have completed their work here.

Mr. Chairman, we are here today, not merely as representatives of the press, but as surrogates of the public, to use Chief Justice Burger's expression. We are here to be helpful.

Given the length and complexity of the amendments proposed both by yourself and the administration, it is impossible for us to comment exhaustively on all the specific proposals during this hearing, so please permit the written submissions of the ANPA, ASNE, and the Society of Professional Journalists to be made part of the record, and let us try this afternoon to touch upon some of the major issues.

Senator HATCH. Ms. Otto, we will keep the record open for you and for all organizations who want to submit materials, who are concerned, and who have notified us up to now. We will keep it open for at least 1 week. I hope that gives you enough time to comment in detail.

Ms. OTTO. It should indeed.

As a team, Charles Rowe, Ed Cony, and I will try to cover a number of issues, including fee waivers, expedited processing for requests made in the public interest, the protection of trade secrets, and the new provisions relating to law enforcement. Ernie Ford will give you a valuable perspective on how some of the proposed amendments might affect news reporting on a local and State level.

All of us, Mr. Chairman, wish to use this special opportunity to thank you sincerely and emphatically for bringing a spirit of reasonableness and graciousness to bear on the general subject of amending the FOI Act.

In comparing earlier legislative proposals to your current one, it is apparent that you have listened, not just to us, but to other users of the act and that you have sought to accommodate competing considerations in a most thoughtful way.

As you will hear this afternoon, we think your bill does seek to fine tune the act, not to bludgeon it. We also believe that specific language refinements and other improvements must still be made if the original legislative purposes of the FOIA back in 1966 are to be fulfilled.

Those purposes, it is useful to remember, were supported by a broad, bipartisan coalition in Congress. There is no reason for any political party to retreat from a commitment to open Government now. Indeed, a good argument can be made that the act is needed

as much, if not more, in 1981, when Government is shrinking, as it was in 1966 when Government was ballooning.

Budget-cutting is bringing swift and remarkable changes in governmental operations, and the temptation for bureaucrats to mask the real impact of those changes is only likely to grow. Certainly, Americans need now the assurances in the FOIA that will enable them to learn how constricted or contained this new Government will affect their lives.

The approach of your proposals in S. 1730, Mr. Chairman, contrasts starkly with the Justice Department's. The Reagan administration has presented your subcommittee with proposals that truncate the act. They methodically curtail the opportunities for the public to examine Government business.

Secrecy is second nature to Government, as this administration must know, but the Justice Department has the audacity to rationalize this proposal by claiming before this subcommittee last October that the FOIA is overrated as an instrument that generates disclosures about bureaucratic malfeasances. This is wrong, and the Justice Department knows that it is wrong.

Press organizations at this table have told the Justice Department repeatedly that the press uses the FOIA constantly and in diverse, often imaginative, ways that result in giving the public information that would not necessarily surface otherwise. We have also told the Justice Department that the usefulness of the FOIA to the public might be improved by certain modifications.

We can understand why the Justice Department has decided not to be responsive to our suggestions for improving the usefulness of the act, but we cannot understand why they pretend not even to have heard the information we have given them about the usage and the effectiveness of the act.

Apparently the Justice Department believes that if it says loudly enough and frequently enough that the FOI Act is of no use to the public through the press but is a big bother to Government agencies, then someone on Capitol Hill might feel less guilty about dismantling it.

We do not have to tell you, Mr. Chairman, about how the press uses the act daily to inform the public. You will recall that Ted Capener, vice president of news for Bonneville Broadcasting Corp., described to your subcommittee last July no less than six major news stories in Utah that depended on the FOI Act for authenticity and strength, including a prize-winning TV documentary on nursing home neglect and several news stories on how radioactive fallout and waste were affecting the people of Utah. Your hearing record is replete with other documented evidence of how the FOIA, imperfect as it is, has given Americans a window to overlook Government.

But what are we to say, Mr. Chairman, when the thrust and chief justification for the administration's proposal relies so heavily on the creation and careful cultivation of myths—the myth that the press does not use the act, the myth that it its efficacy is overrated, the myth that the FBI must have wholesale changes in the act because informants are being deterred from cooperating with the Bureau out of fear that their identities will be disclosed under the FOIA?

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The longer we listen to the FBI about the need for changes in the law enforcement exemption, the more we are persuaded that the Bureau is simply crying wolf. Every time the Bureau tries to prove that law enforcement has been damaged by the FOI Act, the claim collapses.

We have heard no evidence that any informant has been harmed by the release of records under the FOIA, not even by the release of records that should not have been released but were due to administrative ineptitude.

Instead of reassuring its sources that the FOIA works and that confidential information is not released, the FBI and the Justice Department do the opposite. Then, having stirred up fears, they beseech this subcommittee to quell those fears by cutting off virtually all public information of FBI operations.

As an example of the Bureau's fear campaign, consider a recent editorial of October 29, 1981, in the Des Moines Register. The editorial told of Gary Bowdach, an admitted organized crime figure, who told a Senate committee that information obtained through an FOIA request allowed him to identify an informant by decoding scattered letters and blacked-out spaces in the material.

Bowdach speculated that his cagey handiwork had resulted in the informant being killed. Pouncing on this testimony, Assistant Attorney General Jonathan Rose cited this case to express the Justice Department's "astonishment at the press' insistence that the FOIA is not being used to the detriment of law enforcement." Only under questioning did Mr. Rose admit that Bowdach and his fellow hoodlums had killed the wrong person. They had not realized that the records referred to the informant by code number, not by name.

Perhaps Judge Webster can find some fresh evidence to offer this subcommittee this afternoon. He and the Bureau have been trying to come up with some for more than 2 years now. In fact, the Society of Professional Journalists has reason to understand that the Bureau may be devoting considerable resources to the development of classified promotional material that can be used to persuade Capitol Hill how an informant's identity may be ascertainable under the FOIA.

It strikes us that this is a somewhat questionable use of the FBI's funds, a misuse of its substantial talents. Accordingly, the society intends tomorrow to make a formal request under the FOI Act to ascertain the nature and extent of any such promotional materials. Apparently, to borrow a phrase from Madison Avenue, the FBI makes myths the old-fashioned way; it produces them.

This morning, Mr. Chairman, my friend and colleague Katherine Graham, chairman and president of the ANPA, addressed the national convention of the Society of Professional Journalists, and her subject was our subject.

I will close and turn the microphone over to Charles Rowe by quoting Katherine Graham's conclusions. She said:

> Certainly, if the Freedom of Information Act was indeed being seriously misused, I think as citizens we would be concerned with finding remedies. But in fact, the statute was drafted very precisely to protect fully these legitimate interests, and I think the burden lies on those seeking to change it to demonstrate how those perceptions have failed. For the most part, I have to conclude that the problems that

have been ascribed to the Freedom of Information Act are greatly overdrawn, and the proposed solutions for the most part seem as unneeded as they are undesirable. The case for a sweeping overhaul of the act simply has not been made.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Ms. Otto.

Mr. Rowe?

STATEMENT OF CHARLES ROWE, REPRESENTING THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. ROWE. Mr. Chairman, I welcome this opportunity to testify today on the Freedom of Information Act.

My name is Charles Rowe. I am editor of the Free Lance-Star in Fredericksburg, Va. I represent here today both the American Newspaper Publishers Association and the National Newspaper Association. Together these trade associations represent the vast majority of daily and weekly newspapers in the United States.

In the interests of time, I will summarize my remarks this afternoon and request that our full statement be submitted for the record.

Senator HATCH. Without objection, we will put your full statement in the record.

Mr. ROWE. Mr. Chairman, the newspapers of our country are deeply troubled by the growing efforts to significantly amend the FOIA. This is evident from the panel which is gathered before you here today.

Also, as Ms. Otto mentioned, Katherine Graham, chairman of the board of the Washington Post and chairman of ANPA, in her speech today before the Sigma Delta Chi convention, issued a rallying cry for all to work together to oppose any radical amendment of this law. With your permission, I would like to submit a copy of her speech for the record.

The vote is unanimous. The mandate of the FOIA that the business of Government is the people's business must be preserved. ANPA and NNA believe that passage of either your bill, S. 1730, or the administration's proposal, S. 1751, in their present forms would undercut the principles of openness which are the bedrock of the present law.

We do find most provisions of your bill preferable to those contained in S. 1751. We would also like to commend you for your efforts to narrow significantly provisions in S. 1730 over those introduced earlier. However, we could not support either bill without substantial modification.

We do not mean to imply that we are absolutely opposed to any changes in the FOIA. In fact, we believe there are several areas where the act could be improved to make it more effective.

For example, we strongly support the provision in S. 1730 which would require the Office of Management and Budget to develop uniform fee schedules for all Government agencies. This is a concept we supported during the last Congress, and we continue to believe that this uniformity would result in a law which is easier for the public to use and easier for the Government to administer.

Both bills would expand current law to allow agencies to charge not only for search and duplication of efforts but also for agency reviews. While we oppose this expansion, we believe it is impera-

tive that if this is enacted the public interest waiver provisions of the current law must likewise be strengthened and made mandatory.

In addition, we believe that the GAO should be required to conduct a careful study of FOIA processing and develop meaningful criteria on what constitute reasonable review costs. We also support the approach of S. 1730 to maintain the existing time limits of 10 days for an initial response by an agency and 20 days for an appeal.

However, we believe that several of the definitions of "unusual circumstances" included in S. 1730 should be narrowed. These definitions, such as that which would allow delay for a "major, abrupt and unexpected increase" in the number of requests received by an agency, we feel, are overly broad. We do not believe that they would serve as helpful guidance to an agency but could too easily be used as delay tactics for legitimate information requests.

We also believe that procedures should be built into the current law to allow notification to companies which submit information to the Government that that information is the subject of an FOIA request. This is only fair. We strongly oppose, however, provisions in S. 1751 which would allow submitters to unilaterally stamp all documents "confidential" upon submission.

We also strongly oppose provisions in S. 1730 which would allow for informal ex parte hearings when a submitter opposes release of information. These hearings would only serve to delay the process and would add a substantial administrative burden to an act that is too frequently labeled "burdensome."

ANPA and NNA also believe that the reverse FOIA time limits recommended in both bills are far too long. We believe that the entire reverse FOIA procedure should not exceed 30 working days from the date of the initial request. This is ample time for all affected parties to have their say and make their decision.

We in no way support any change in the substantive language of the (b)(4) trade secrets exemption. While we agree that it is consistent with basic notions of fairness to notify a submitter when requests are made for information it supplied to Government, we do not believe that a case has been made for greatly expanding the classes of information protected by this exemption.

Several studies back up our position. A 1978 report on exemption 4 by the House Committee on Government Operations determined that, "Disclosure of business data has caused some administrative difficulty, but the committee has found no major abuses."

A more recent study confirmed the House committee's findings. While this later study found that there is "little evidence to suggest that exemption 4 of the FOIA is working poorly," it did conclude that perceptions that the exemption was not working well could be cleared up by establishing reverse FOIA procedures.

I would like to take just a couple of minutes, Mr. Chairman, to describe how my own newspaper is currently making use of the FOIA. It is not a success story yet. Rather, it is a story of months of frustration. Yet, without the FOIA as a helpful tool for a reporter, I doubt if we would have made the modest progress that has been made so far.

The story begins in January of this year, 10 months ago. I assigned a reporter to contact the Richmond, Va., regional office of the Small Business Administration to get information on SBA loans to businesses in our area, including those loans where defaults had occurred. I made this assignment after receiving a tip which told me that a look at these records might provide some information concerning possible abuses of SBA loans.

We were first put off by an SBA regional official who said he was getting ready to go on 10 days' leave and he would talk with our reporter when the leave was over. OK. We got together with him.

Although the information we wanted was available in the Richmond SBA office, we were told we could not get it there because that office contended it did not have the personnel to dig out the data. We said we would look and dig it out. No, they would not permit us to look at the files because they said we might see protected information.

So the scene shifted to Washington where we filed an FOIA request for the information that we wanted. Finally, in June, 5 months after we began seeking the information, we were given a list of loans that had been approved in our area but were denied a list of loans that were in default. So we renewed our FOIA request for the default information.

In the meantime, I learned that the Miami Herald had won a Federal district court case against the SBA, and the court had ruled that default loan information should be provided by the SBA to that newspaper. SBA appealed the *Miami* case to the circuit court of appeals and cited the pendency of that appeal as the reason they would not follow the district court decision with regard to our request.

Still later I learned that the SBA had in fact provided the Miami Herald with a list of default loans in one category, and so I asked the SBA why we could not get similar information.

In September, 9 months after this process began, the SBA finally conceded that they might be able to provide us with the Miami Herald-type information. We still do not have that information, and last week, 10 months after the initial request, we were told it would probably take another 4 weeks before it could be provided.

If the SBA has been this dilatory when we were using the FOIA and talking with them of possible litigation, I shudder to think what their attitude would have been without the FOIA or with an FOIA that was weaker than the present law.

My paper is small, and we have a limited reportorial staff. When we hit roadblocks in seeking information from the Federal Government, we cannot often devote endless hours of staff time to an effort to dig out that information. We need the FOIA and a strong FOIA to help us in our struggles with the Federal bureaucracy.

In short, Mr. Chairman, the newspapers of this country believe that the Freedom of Information Act is a good statute, carefully written, and for the most part, well enforced. It reflects more than a balancing of significant interests. It embodies a national commitment to the need for Government to operate in full view of the public.

FOIA sends its signal around the world as well that a fundamental pillar of democracy is the ability to function openly. These prin-

ciples and the need for the press to be able to do its job in reporting activities of Government to the people make an overwhelming case for preserving this important statute. To diminish these guarantees is to convey the impression to the public and to the world that secrecy is to be preferred over openness. We cannot afford to send that message.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Rowe.

[The prepared statement of Mr. Rowe follows:]

Prepared Statement of Charles S. Rowe

Mr. Chairman, the American Newspaper Publishers Association and the National Newspaper Association welcome the opportunity to express our views on your legislation, S 1730, the "Freedom of Information Reform Act" and on proposals included in the Administration's proposed legislation, the "Freedom of Information Improvements Act of 1981." We believe that the FoIA sets a standard of openness for our federal government. It serves as a statement to the public that the business of government is the people's business. Preserving that mandate must be the primary goal of this subcommittee. The Freedom of Information Act must not be reduced to a "Freedom From Access" law.

My name is Charles S. Rowe and I am editor of The Free Lance-Star in Fredericksburg, Virginia. Our newspaper is a member of ANPA and I am pleased to participate with other newspaper executives as a member of ANPA's Government Affairs Committee, which advises the Board on FoIA and other government issues affecting the press. I represent here today both the ANPA and the NNA.

ANPA is a [illegible] than 1,[illegible] newspapers representing more than 90 percent of the daily and Sunday circulation in the U.S. Many nondaily newspapers also are members.

NNA is a national trade association representing more than 5,000 weekly and daily community newspapers located throughout the U.S.

This is not a first appearance before Congress for either of these Associations on this issue. Representatives from both NNA and ANPA have testified several times over the years before both the Senate and the House of Representatives supporting the FoIA. Our message each time has been clear: the FoIA guarantee of public access to government records must not be weakened in the name of legislative "fine-tuning."

Mr. Chairman, ANPA and NNA are not prepared to support the Administration's proposal or S 1730 in their entirety. We feel it is important to point out

that most provisions of S 1730 are far preferable to the Administration's proposals. We would also like to commend you on your efforts to narrow significantly provisions in S 1730 from those introduced earlier. We do feel, however, that while we could support several of the proposals in S 1730, additional adjustments are needed to ensure that the Act remains what it was intended to be: a law ensuring freedom of information for the public.

Among the changes which ANPA and NNA believe should be made: a) develop uniform fee schedules for all government agencies — a proposal included in S 1730 which we strongly support; b) strengthen and make mandatory the public interest waiver provisions of the Act; and c) include a definition of "records" which would resolve problems created by the U.S. Supreme Court decisions in Forsham v. Harris and Kissinger v. Reporters' Committee for Freedom of the Press.

We have listened carefully to arguments of the government agencies to limit access to their files. We have heard complaints that the Act is too burdensome and costly to administer. We have heard dire reports of the "perception" problems that the mere existence of the Act has created for our government's law enforcement and intelligence agencies. These agencies have not met their burden in showing that these alleged problems outweigh the presumption of open access that lies at the heart of the FoIA.

Access to information historically has been an area of contentention between the government and the public. While government agencies are not generally philosophically opposed to disclosing information on their activities, practically speaking, they usually do not want to be bothered. As was pointed out in the Senate Report on the 1974 amendments to the Act (S. Rpt. 93-854), agencies and officials of the executive branch "uniformly opposed" the Administrative Procedure Act in the 1940's and the passage of the FoIA in 1966. As the report states, "On each occasion, Congress concluded that administrative due process and public access to information outweighed administrative inconvenience, and laws were passed accordingly." We would

hope that this is still the conclusion of Congress and that members have not been unduly swayed by vague complaints of "burdens" and "perceptions."

It is also important to remember that this — almost more than any other issue -- is clearly a bipartisan concern. There is not Democratic and Republican information in our government; there is, solely, information. Presidents from both parties have publicly voiced support for FoIA. President Johnson, in signing FoIA into law in 1966, said, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." And President Nixon in issuing a new Executive Order on classification and declassification of government information in 1972, said, "Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and — eventually — incapable of determining their own destinies." Mr. Chairman, we must be careful not to foster distrust among the public, and we believe that passage of either S 1730 or the Administration's proposal, in their present forms, could result in a public "ignorant of their own affairs."

Following are ANPA's and NNA's positions on specific proposals in S 1730 and the Administration's proposal:

TIME LIMITS

ANPA and NNA believe strongly that existing time limits -- 10 days for an initial response by an agency and 20 days for an appeal — must be maintained. Moreover, we believe there should be procedures for expedited responses to public interest information requests. We support S 1730's maintenance of these time limits. However, we believe the language defining "unusual circumstances" should be narrowed.

When the Act originally was passed in 1966, there were no time limits within which an agency had to respond to requests. A primary goal of the 1974 amendments was to remedy this problem. As Senator Strom Thurmond pointed out

in his opening statement at Senate hearings on the 1974 amendments, "Often the lapse of time or unjustified delay renders the information useless."

Mr. Chairman, it was crystal clear in the record developed in 1974 that agencies were needlessly delaying their responses to FoIA requests and using time as a weapon effectively to moot the need for requested information.

Current law allows for extensions of time in unusual circumstances, but not beyond 10 working days. We believe this has allowed agencies the necessary flexibility to respond to most requests. And, in fact, since the decision in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), which allowed extensions when an agency was "exercising due diligence," we are unaware of any cases where an agency has been cited for abusing the time limits.

If you do feel it important to state expressly what should be considered "unusual circumstances," we recommend adoption only of those included in the legislative history of the 1974 amendments, all of which are included in S 1730. The legislative history considers as "unusual circumstances": where the agency must search for and collect the requested records from field facilities separate from the office processing the request; where the agency must search for, collect, and examine a voluminous amount of separate and distinct records demanded in a single request; or, where the agency has a need to consult with another agency or agency unit having a substantial interest in the determination because of the subject matter.

We would oppose, however, expansion of this definition as envisioned in Sec. 3, paragraph (6)(B)(iv)(v) and (vi) of S 1730. These sub-paragraphs would, respectively, allow the head of an agency to delay if a request would "substantially obstruct and impair the urgent performance of a statutory agency function in aid of the public health, safety or welfare,the national economy, law enforcement, or the national defense of foreign relations"; allow delay if a request involves "balancing the interests" of a requester and a submitter; and, allow delay for a "major, abrupt and unexpected increase" in the number of requests received by an agency.

We believe that these three definitions are overly broad and would not serve as helpful guidance to any agency in determining "unusual circumstances," but, rather would be used as roadblocks and delay tactics for legitimate informational requests.

FEES AND FEE WAIVERS

ANPA and NNA strongly support the provision in S 1730 which would require the Office of Management and Budget to develop uniform fee schedules for all government agencies. This is a proposal which ANPA and NNA endorsed during the last Congress. Such uniformity would serve to aid requesters who are faced with a wide array of fees and charges among the maze of government agencies.

S 1730 and the Administration proposal would expand current law to allow agencies to charge not only for search and duplication of records, but also for agency review. While we oppose this expansion, we believe it is imperative, that, if this is enacted, the public interest waiver provisions of the current law must likewise be strengthened and made mandatory. In addition, we believe that GAO should be required to conduct a careful study of FOIA processing and develop meaningful criteria on what constitutes reasonable review costs. And finally, legislative language should clearly state that fees may not be used to discourage requests or as obstacles to disclosure of requested information.

Public-Interest Waiver Provisions -- Current law allows an agency to waive all charges if the requested information would primarily benefit the general public. S 1730 allows waivers where this meets a "substantial public interest." Moreover, it lists five standards which may be considered by an agency in determining whether to waive fees. ANPA and NNA could support 552(a)(4)(A)(ii)(a)(b)(d) and (e). However, we oppose (c), which states as a consideration the "likelihood of dissemination to the public of significant information clearly and substantially benefiting public health or safety." This language unnecessarily pinpoints "public health and safety" as public interest considerations. The general "public interest" statement in (a)(4)(A)(ii) is sufficient.

DUPLICATIVE REQUESTS

S 1730 and the Administration's bill allow withholding information consisting of "newspaper clippings, magazine articles, court records" and other items publicly available. The Administration proposal states that a government agency "shall" inform a requester where the information can be obtained. S 1730 states that the agency "may" inform a requester. ANPA and NNA believe the mandatory "shall" is essential and that language should be included which requires the agency to reveal "with specifity" where the requested information could be found.

The administration bill includes a proposal which would relieve agencies from the requirement of indexing final opinions and orders unless they are, "cited, used, or relied on as precedent by the agency." We agree with the wisdom of not including a similar provision in S 1730, and would strongly oppose this proposal.

We are concerned that the language in S 1730 in proposed new paragraph (a) (8) is overly broad. This would require a requester to state the number of requests made within the past two years "on the same general subject." If multiple requests are made, agencies would be able to coordinate their responses with other involved agencies and would be required only to update the requested information. We agree that agencies should not be required to deliver the same information to a requester over and over again. However, the "same general subject" language could be applied very liberally, i.e., any request dealing with antitrust matters. The result would be not only less information for the requester, but increased paperwork and administrative duties for the agency in seeking the certification from the requester.

REASONABLY SEGREGABLE

S 1730 includes five standards which may be considered by a government agency in deciding which parts of a record are "reasonably segregable."

We are concerned that several of these considerations could too easily lead an agency employee to withhold entire documents. An employee could simply decide that deletion of, for example, three words rendered a document "unintelligible" and, therefore, non-releasable.

The "reasonably segregable" language was added to the Act in 1974. It was added following a recommendation by the Administrative Conference and was included to make the Act consistent with court interpretations of FoIA. Among the court findings, "The statutory history does not indicate...that Congress intended to exempt an entire document merely because it contained some confidential information." [Grumman Aircraft Engineering Corp. v. Renegotiation Board., 425F. 2d 578, 580 (D.C. Cir. 1970)]. Any diminution of this standard could too easily take us back to the time where entire records were withheld because they included a single confidential name or piece of information. This must be avoided.

DEFINITION OF RECORDS

ANPA and NNA believe a definition of "records" should be included in FoIA. While we could accept the bulk of the Administration's proposed definition, we consider far too broad the portion which includes any "form or documentation created for the personal convenience of any government employee or official." ANPA and NNA, however, support attempts to include a definition, and believe that any definition must include language which would resolve problems created by the U.S. Supreme Court decisions in Forsham v. Harris, 445 U.S. 169 (1980) and in Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136 (1980).

The Administrative Law Section of the American Bar Association is considering recommendations to amend the FoIA. ANPA and NNA agree with the Section's recommendation that a definition of "records" should include "any record created by the agency, even if wrongfully removed by a government employee." And, "any record prepared on behalf of the agency with government funds if the agency has a right to obtain possession of such record and such record is relevant to a regulatory action (rule or adjudication) of the agency."

JUDICIAL REVIEW

There are several provisions in the Administration's proposal dealing with judicial review of FoIA decisions. ANPA and NNA are concerned primarily with the proposal to allow a requester only 90 days within which to appeal an FoIA decision.

ANPA and NNA believe 90 days is excessively short. (The statute of limitations in libel cases in many states, for example, is one year.) The 90-day period would likely result in a proliferation of appeals by those who rush to court, fearful that the 90 days will too quickly expire.

These two associations also believe that the standard of review for Exemption (b)(1) should remain de novo. Section 6 of the Administration bill would reduce it to an "arbitrary and capricious" standard. We see no justification for treating this exemption differently from the others. To require judges to pay greater deference to agency determinations in this area is to imply that the federal judiciary cannot be entrusted with making judgments on the appropriateness of classification of information and weighing the national security with the public's right to know. Justice Lewis Powell, speaking for a unanimous Supreme Court, responded to this implication in U.S. v. U.S. District Court, 407, U.S. 297, 320 (1972), by rejecting: "the government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases." We could not agree more with the distinguished Justice.

Both S 1730 and the Administration proposal would significantly expand Exemption (b)(2) to include among other things, "manuals and instructions to investigators, inspectors, auditors, negotiators, and examination material used solely to determine individual qualifications for employment, promotion or licensing."

Moreover, this broader language is included without requiring a demonstration of "harm" from disclosure. In addition, both bills include language which broadly states that the information is exempt if "confidentiality is necessary to effective law enforcement and other vital government functions" (Administration). And, information is exempt, if it would "jeopardize law enforcement, negotiations, protection of government officials..." (S 1730).

ANPA and NNA do not support expansion of Exemption 2 and believe the proposed language is far too broad. We also believe, that if this Exemption is expanded, a "harm" standard must be included.

EXEMPTION 4 - TRADE SECRETS

Current law exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

ANPA and NNA strongly oppose any change in the substantive language of this exemption. While we agree it is consistent with basic notions of fairness to notify a submitter when requests are made for information it supplied the government, we do not believe that a case has been made for greatly expanding the classes of information protected by this exemption.

In a 1978 report on Exemption 4 by the House Committee on Government Operations, it was determined that, "Disclosure of business data has caused some administrative difficulty, but the committee has found no major abuses." (Emphasis added) The report goes on to say, "Many difficulties with Exemption 4 have been procedural rather than substantive. Agency procedures for deciding requests for business data have not always been suited to the fourth exemption and have not always adequately recognized the interests of the data submitter or the data requester." It is obvious to us that history has not shown a need to expand the language of this exemption.

A much more recent study (Aug. 1981) by Professor Russell Stevenson of the George Washington University National Law Center on Exemption 4 confirms the House Committee's findings. After exhaustive research into the matter, Stevenson's prime finding was:

> Although there is little evidence to suggest that Exemption 4 of the FoIA is working poorly under present practice — in the sense that information that falls within the exemption is frequently released in response to FoIA requests — the perception that there are problems is so strong that some action is necessary to rationalize the present procedures and to provide more complete assurance to submitters that their confidential business secrets will not be released under FoIA.

Stevenson, at 1 (Emphasis added). Stevenson was unable to document that there had been severe loss of business confidential information through the

FoIA. In fact, he found, there is "some evidence" that the "FoIA does not function as badly in this area as its critics charge." Stevenson, at 22-34, 36.

One of the FoIA's "critics" is the Health Industry Manufacturer's Association which, in testimony of Oct. 7, 1981, on S 1247, the "Preservation of Confidential Information Act," details several examples of confidential business information it claimed was released under the FoIA. (See HIMA testimony, at 7-11.) Assuming that HIMA's undocumented examples are correct and accurate, there is not one that could not have been remedied with procedural changes of the type which ANPA and NNA believe are fair. (See discussion of Reverse FoIA, infra.) What seems to have occurred in each of HIMA's seven examples is not that the agency, the Food and Drug Administration, made a sweeping determination substantively that the information was not exempt under (b)(4) or that it would release the information notwithstanding coverage by the exemption. Rather, the FDA simply seemed to have been in need of the benefits of information from the submitter in order to make an informed decision, as is graphically illustrated by the FDA's apologies and changes of mind. This would be cured by simply adopting a fair — and speedy — procedure whereby the submitter could adequately contest a proposed release of any information it believes confidential.
A change in the substantive standard, as interpreted under National Parks and Conversation Association v. Morton, 498 F. Sec. 765, 770(D.C. Circ. 1974), is wholly unnecessary overkill, with the counterproductive impact of restricting information on the enforcement of law and regulation in the business community. The substance and caliber of that enforcement are of prime concern to the public, and should be to the business community.

REVERSE FoIA

ANPA and NNA do support establishment of procedures to allow submitters to oppose release of information they have submitted to the government. We believe this is fair. The government should not serve as a sieve for information submitted by third parties. However, we believe that both S 1730 and the Administration proposal allow too much time for the procedure and strongly favor the rights of a submitter over the rights of a requester. The Administration's proposal is particularly troublesome because it would allow submitters to unilaterally stamp all documents'"confidential" upon submission.

We do not support the provisions for informal, ex parte hearings included in S 1730. This would only serve to delay the process and would add a substantial administrative burden to an Act that is too frequently labeled "burdensome."

ANPA and NNA believe the time limits should be carefully structured to avoid needless delay and should not exceed 30 working days from the date of the initial request. This time frame would allow an agency 5 days within which an agency would notify a submitter a request for information has been received; 5 days within which the submitter could oppose release of the information; 5 days within which a requester could appeal the submitter's opposition; and 5 days for the agency to rule. In "unusual circumstances" this could be extended, but not for more than 10 working days. It is critical that the requester and the submitter are notified throughout the process of the opposition being filed and the agency response.

EXEMPTION 6 — PERSONAL PRIVACY

Exemption (b)(6) currently exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We understand that efforts to amend this language are aimed at more precisely defining the "similar files" language. While we do not believe this to be necessary, we could support the language in the Administration's proposal which generally exempts "records or information concerning individuals." It is imperative, however, that the "clearly unwarranted invasion" standard, which exists in current law, be maintained, as it would be in S 1730.

One of the reasons we oppose reducing the stringency of the personal privacy exemption is because it can easily be used to cover up information embarrassing to government officials. In fact, it already has. The Small Business Administration refused to release a report of violations of the 1964 Civil Rights Act, as amended, because it claimed the findings of sex discrimination would harm the reputations of those officials involved, and was, therefore, an invasion of their personal privacy. A federal district court disagreed, however, ruling that there were no intimate details of their personal lives at stake and that the public interest in agency compliance with the Act overrode any personal privacy interest in this instance Carl Stern v. SBA, No. 80-283 (DDC, Dec. 23, 1980).

ANPA and NNA agree with the approach of S 1730 in amending the law enforcement exemption. However, we strongly oppose elimination of the word "investigatory" from the definition of what is exempted. S 1730 would allow withholding of all "records maintained, collected, or used for law enforcement purposes" and includes six tests to be met before the information is withheld. While we believe that minor adjustments could be made to the six tests to make them acceptable, expansion to include all law enforcement records is far too broad and would effectively exempt any civil or criminal agency dealing with law enforcement matters from the scope of the Act.

This is particularly disturbing since the FBI has been unable to cite a single instance in which an investigation has been hampered because of information released under the FoIA. Current law already protects investigatory information, release of which would harm an ongoing investigation, reveal a confidential source, invade individual privacy, expose investigative techniques, endanger law enforcement personnel or deprive a criminal defendant of a fair trial. We strongly believe this provides adequate protection for the effective functioning of our nation's law enforcement agencies.

We could accept the standards included in S 1730, with fine tuning. 7(A) and (B) in S 1730 are identical to current law and should be maintained. 7 (C) of S 1730 maintains the "constitute an unwarranted invasion of personal privacy" language of current law, but adds "or the privacy of a natural person who has been deceased for less than 25 years." We are uncertain of the rationale for including such a provision and recommend deletion of the language.

7 (D) changes the current "disclose the identify of a confidential source" to "tend to disclose the identity of a confidential source." The "tend to" language is overly broad. If some narrowing of this standard is considered necessary, we would recommend "reasonably could be expected to disclose the identity of a confidential source."

We strongly oppose Section 7(C) in the Administration bill or any proposal resembling it which would give the Attorney General blanket authority

to exempt any information relating to investigation of terrorism, organized crime or foreign counter-intelligence. We oppose allowing the Attorney General such unrestrained discretion and believe the activities mentioned are protected by the balance of the exemption.

In conclusion, Mr. Chairman, we believe the changes which we recommend could result in a federal Freedom of Information Act which strikes a workable balance between the public's right to know and the government's need for a certain amount of secrecy and confidentiality. This balancing act is a difficult one, and we commend you for taking it upon yourself to try and walk the fine line. However, we would urge, in the strongest possible terms, that the final product take into full consideration the overriding need and right of the public to have the fullest possible knowledge of their government's activities. The presumption of openness implicit in this law must not be undercut. The federal FoIA stands as proof of the open society of which all Americans are proud.

Senator HATCH. Mr. Cony.

STATEMENT OF EDWARD CONY, REPRESENTING THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

Mr. CONY. Senator Hatch, I would like if I could to join my colleagues in presenting a summary of our views and submitting a more detailed statement for the record.

Senator HATCH. All statements will be placed in the record as though fully delivered, and I appreciate the summarization.

Mr. CONY. Thank you.

I would also like to join Jean Otto in something she said. The Society of Newspaper Editors would like to commend you for the improvements that we see in S. 1730 compared to the original bill. We appreciate the time that you and your counsel, Mr. Rader, have taken to consider our objections and to try to meet some of our objections.

Senator HATCH. Thank you.

Mr. CONY. The American Society of Newspaper Editors consists of 850 editors from a cross section of the American press, small, medium-sized, and large newspapers from every State in the Union. The society seeks to improve the quality of newspaper journalism in the United States, and we try to help one another produce better newspapers that serve the American public by providing information the public needs and by observing the best practices of a free and untrammeled press.

ASNE does have serious concerns about any proposal to exempt in whole or in part the FBI and the CIA from the disclosure obligations of the FOI Act. We would ask, "Does the act as it is now written really force the CIA and the FBI to make disclosures that en-

danger national security or endanger the lives of FBI informants or impede law enforcement by the FBI?"

I realize that the CIA is not mentioned in your bill, Senator Hatch, nor in the administration's bill. I think I am right; it is not mentioned specifically in there. That is an omission I find comforting, but I would like to talk about the CIA for just a few minutes, because there are people who want the CIA exempted from the act, among them the CIA Director himself.

Senator HATCH. I might interrupt you for a second. That is true, and there are a number of Senators who, of course, want the CIA exempted from the act. I have mixed emotions about that myself because of some of the allegations that they are being severely hampered in intelligence operations throughout the world. That is something we will have to address separately, it seems to me.

Mr. CONY. That being the case, I am glad that we could have the chance to give you our views on this.

Senator HATCH. We are happy to have them.

Mr. CONY. All classified information is exempted from the act now. So too is information exempted by virtue of another statute. Thus, the courts have construed the exemption to apply to that section of the National Security Act which provides "that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

Let us look to see how this works in practice. Recently, the District of Columbia Circuit Court of Appeals upheld the CIA's denial of a reporter's request for documents showing the size of legal bills and fee arrangements between private attorneys and the CIA.

Mind you, under this request, none of the attorneys would have been identified. Their names were not sought, only the size of their fees. But the court concluded that a large fee might enable a trained analyst to use that fee in conjunction with some other information he might have to draw some sort of conclusion about the size, the nature, and the extent of American intelligence operations. Consequently, the reporter did not get the information about the fees.

If you will permit me a personal aside, I think it has been our experience that all lawyers' fees are large, and generally their bills are uninformative.

Senator HATCH. Your criticism of attorneys is quite harsh, but I have to agree with you. I think it is probably correct. [Laughter.]

Mr. CONY. So far we seem to be in fairly substantial agreement.

Senator HATCH. We have already reached some agreement anyway.

Mr. CONY. It seems clear that under the act today the CIA is hardly shoveling out mounds of information because of FOIA requests from the Soviet Embassy or from foreign agents, as some proponents of a blanket exemption for the CIA have appeared to suggest.

Indeed, at our ASNE convention, which was also here in Washington last year, Adm. Stansfield Turner, then the Director of the CIA, said—and I quote him—"Thus far, we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released."

Senator HATCH. I might add that they have since lost one case, at the circuit court level.

Mr. CONY. I am unaware of that.

Senator HATCH. It is called *The Holy Spirit* case and was decided in the District of Columbia circuit. An appeal to the Supreme Court is likely.

Mr. CONY. Let me move on to the FBI. Under the act's exemption 7, the FBI is already permitted to withhold information compiled for law enforcement purposes if the information was obtained from a confidential source or would interfere with enforcement proceedings, or would disclose investigative techniques or procedures.

This seventh exemption represents, as you know, efforts by Congress in 1974 to amend the act to protect confidential sources. Indeed, we feel the act overprotects the FBI and other Federal law enforcement agencies.

The FBI has made exclusive use of what has been called the 10th exemption, the "We don't want to give it to you" exemption. Simply by recalcitrance and foot-dragging, agencies suppress information that does not fall within the nine express exemptions of the act.

One technique is to produce documents so shot through with indiscriminate deletions that what remains is virtually useless, and I think you have indicated you have a problem with some of the information released because it is almost meaningless.

Senator HATCH. It sounds like they learned something from the SBA.

Mr. CONY. A recent visitor to the FOI Act Processing Division at the FBI encountered a sign on the wall that tells the story, "When in doubt, black it out."

The FOI Act rests on the principle that the Government of this country represents the people and is accountable to them. Thanks to the FOI Act, and despite what we see as some of its existing impediments, serious and dogged reporters have been able to force disclosures of misgovernment, maladministration, and abuse of legal authority. At the same time, the act as currently drawn, we believe, protects fully all the legitimate interests in the name of national security and law enforcement.

We urge the Congress not to reverse the very purpose of the FOI Act through a series of amendments that would tip the balance in favor of nondisclosure instead of disclosure. Such a reversal, we believe, would constitute a frontal attack on the American principles of government.

I would like to end today with telling you about a lawsuit in progress between our company, Dow Jones, which publishes the Wall Street Journal, and the SEC and the Justice Department.

Charlie Rowe mentioned that his story began 10 months ago. Ours began 5 years ago, late in 1976, when one of our reporters, the late Jerry Landauer, first asked the SEC for information concerning what euphemistically had been called "questionable payments by U.S. companies overseas and in the United States." I might say, not so euphemistically, what we are talking about here, at least in some cases, is bribery.

In 1977 the SEC responded to our request and ordered the information be given to us. Then it quickly reversed itself because the

Justice Department was investigating some of these same companies.

Throughout 1978 and into 1979, we tried, with very little success, to get the Justice Department and the SEC to release information about investigations that had been completed. I want to emphasize that. We wanted only information from closed investigations, not those that were underway.

In May of 1979, almost 3 years into the effort, we sued under the FOI Act. More than 1 year later, in July and August of 1980, our company and the SEC agreed to certain stipulations governing the procedures for the release of some information.

The Justice Department agreed to similar stipulations in October. Some information, as a matter of fact, has been released as a result. However, these stipulations cover procedural questions only. Still unresolved are the issues of substance concerning the information the agencies are withholding from us.

I would like to make five points about this lawsuit.

One, so far not one company has intervened to try to stop the agencies from releasing information to the Wall Street Journal.

Two, Dow Jones began litigation only after more than 1½ year of efforts to get the information administratively; 5 years have now passed, and the amount of information released is still relatively small.

Three, Dow Jones has sought information, as I mentioned before, from investigative files only after the cases have been closed.

Four, the cost in legal expenses, time, and effort of reporters has been considerable for Dow Jones. I do not mean to plead poverty here, but I think it is fair to say that many smaller papers simply could not afford the expense.

I think, parenthetically, we should not forget that most of the papers in the country are small and medium-sized and they do a lot of fine investigative reporting and perform a real service for the country.

Five, public statements of the agencies indicate to us that they have more concern for protecting the confidentiality of the information obtained from the companies that they have investigated than they have in the public's right to know about these important Government investigations.

Thank you very much.

Senator HATCH. Thank you, Mr. Cony. You make some excellent points.

Senator HATCH. Mr. Ford.

STATEMENT OF ERNIE FORD, REPRESENTING THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Mr. FORD. Thank you, Senator.

Obviously, it is a pleasure for me to appear here before you, too, to express my concerns about the Freedom of Information Act. It is also a pleasure because those of us in the western homelands from whence you hail owe it to ourselves every once in a while to come back just to check to see if you are on the job.

Senator HATCH. I think I am too much on the job sometimes around here.

Mr. FORD. So far you are coming up with a passing grade.

Senator HATCH. Well, that is the first time. I am really happy to hear it.

Mr. FORD. It could end by the end of the week. [Laughter.]

Last July you heard a colleague of mine, Ted Capener, who explained to you with a few examples just how important the Freedom of Information Act is to journalists in our State of Utah. I will not bother to repeat that list here, but only to say that what Ted Capener reports in Utah is true for many of my fellow reporters who do not work in the bureaucratic maze of the Nation's Capital, but who labor hundreds and often thousands of miles away from the Nation's repositories of information. They are often faced with the necessity of obtaining vital facts and figures from Washington, and many times the Freedom of Information Act offers the only practical way to obtain that information.

Let me also say for those of us who must deal with the centers of government by long-distance telephone or through the sometimes less than reliable mail service, even with the existence of the Freedom of Information Act, obtaining records is often at best difficult. It can be an exhaustive, frustrating, and time-consuming experience, one which demonstrates to us time and time again that a strong FOIA is our salvation.

Senator, as you know from our conversations, I also believe the Freedom of Information Act is in need of an overhaul, but my concern has been that the exemptions already written into the act are too broad and are often used by administrators to conceal information which would clearly be of no harm if it were released to the general public.

The tenor of the Reagan administration efforts to amend the FOI Act frighten me. There are a great many arguments made, some before this very committee, that law enforcement efforts are being hampered because information cannot be kept secret.

It may surprise you to know that investigative reporters in our State, especially at KSL television, spend a great deal of time corresponding with the Federal Bureau of Investigation for the FOIA on many matters, including the matter of greatest concern to the FBI, which is organized crime. The FBI—at least it is when it deals with reporters in Utah, and I doubt if it is any different across the Nation—is extremely reluctant to give out that information, even under the present exemptions it enjoys.

As an example, our investigative unit recently submitted an FOIA request to the Bureau regarding an organized crime figure with possible ties to some very shady dealings in our State. The FBI, in our initial telephone conversations and through FOIA requests, made it clear that it would resist any attempts to release documents, even though the alleged organized crime dealings were nearly a decade old.

We also pointed out to the FBI that the particular person in question had also been dead for 7 years, a much shorter period of time than the 25-year period exemption currently being discussed in your bill. The FBI, however, did not concede that point. They would not tell us that they thought the person was indeed deceased, but they did say that if he was, then certain information would be available under the FOIA.

So the FBI required KSL to submit legal proof that the organized crime figure was dead and told our reporter, Brad White, that if KSL could accomplish that fact then the material would be released. I am certain the FBI was aware of the death. If it was not, perhaps our story should have been about the FBI's poor investigative techniques, not about the organized crime figure.

KSL finally gave the proof required, and the material was furnished, but it did require some rather lengthy and innovative reporting techniques on our part to come up with that documentation. The man had died outside of the United States, and it turned out that his death was not a readily available part of the public record of another country.

The point of that little example is to bring up the very purpose for which the Freedom of Information Act was passed in the first place. I am not sure I am telling you anything you do not already know or at least suspect, but Government agencies will do almost anything in many cases to keep from giving to the press and the public information to which it is entitled.

The act was designed to require Federal agencies to tell the public what is going on. The administration bill, with its sections to allow agencies to determine for themselves which information shall and shall not be kept secret, seems to me a violation of the very purpose of the act. While these exemptions may be well intentioned, they can be easily broadened so that they are an unwitting tool to emasculate a law that has been of great benefit to the public. Let me stray from my prepared comments just a second to give you an idea of how that can happen.

The FBI in its testimony has mentioned that it believes that the Freedom of Information Act has been a great deterrent to it in investigating organized crime. It turns out that the FBI for 2 years has been conducting a study about the impact of the FOIA—and I will say here that for some of this information I am indebted to Carl Stern of NBC News—and still has not analyzed the data. It is ironic that Mr. Stern, when he requested this information about the FOI Act under the FOIA was denied the information.

I confess that the original bill that was sponsored by you displeased me nearly as much as the administration's bill does, but I consider your newest proposal a substantial improvement and much less objectionable. As you know, when we began our conversations I was somewhat skeptical, shall we say, about whether you would hear anything that we had to say, and I confess that I was stunned about your response. You have been extremely cooperative.

My main concern with efforts to amend the Freedom of Information Act is the way that the agencies will use it to their advantage. It is no secret among journalists that bureaucrats do not like the FOIA. It forces them to divulge information that they would rather keep secret.

When the original FOI Act was written and later amended, the exemptions therein were adequate. The very materials that many agencies are asking to have specifically exempted now are already exempt under the act. The addition of many new exemptions will only encourage them to bring other materials under the veil of secrecy.

Another interesting little divergence with regard to that, again from Mr. Stern, whom I must credit: Both he and I talked about submitting requests to the Drug Enforcement Administration the other day, which we do some of—it is the agency which probably uses informants more than any other law enforcement agency on the Federal level—and discovered approximately the same experience—that once an FOIA request is submitted, it takes 18 months to finally get a reply.

Mr. Stern was somewhat concerned about that, and, being closer to Washington's headquarters than many of us who deal with the DEA, asked some questions. He found out that the DEA has 40 authorized slots to administer FOIA. He asked how many of them were filled, and the DEA people told him 21. "Why," asked Mr. Stern, "do you not have all 40 of them filled so that you can down this immense amount of time between requests and responses?" A staff member told him, "It is not in our best interests to have a full staff. We would have to release too much information."

I am reminded of an experience related to me by Will Fehr who is now editor of the Salt Lake Tribune. Many years ago, Mr. Fehr worked for the U.S. Information Agency. His job was to read articles from foreign capitals, the New York Times, and other major daily newspapers. He also had one other job. Every day, armed with scissors and a stamp, he would clip out those articles. Then he took a stamp, and he placed an imprint on those articles. That stamp had one word on it, and it was a dangerous one. The stamp said "Classified."

Journalists, at least in my State, live and die, in most cases, by the public record. By extension, so does the public. The public record is our tool to tell the public what is going on in Government, whether the Government wants anybody to know about it or not.

I encourage you today not to restrict us in those efforts. While a restriction through undesirable amendments to the Freedom of Information Act will only frustrate us and make our jobs a bit tougher, it will have a far more dangerous effect on the public. It will deprive the citizens of their right to know, and ultimately it will deprive it of the guarantees of freedom.

Thank you.

[The prepared statement of Mr. Ford and the address of Katharine Graham to the National Convention of the Society of Professional Journalists, Nov. 12, 1981, follow:]

Prepared Statement of Ernie Ford

It is indeed a pleasure for me to appear before you today to express my concerns about attempts to alter the Freedom of Information Act.

Last July, you heard from a colleague of mine, Ted Capener, who explained to you, with a few examples, how important the Freedom of Information Act is to journalists in my state of Utah. I will not bother to repeat that list, but only to say that what Ted Capener reports of Utah is true for many of my fellow reporters who do not work in the bureaucratic maze of the nation's capitol, but who labor hundreds and often thousands of miles away from the nation's repositories of information. They are often faced with the necessity of obtaining vital facts and figures, and many times the Freedom of Information Act offers the only practical way to obtain that information.

Let me also say that for those of us who must deal with the centers of government by long distance telephone, or through the mails, even with the existence of the Freedom of Information Act, obtaining records is often at best difficult. It can be an exhaustive, frustrating and time consuming experience, one which demonstrates to us time and time again that a strong FOIA is our salvation.

As Senator Hatch knows from my conversations with him, I believe the Freedom of Information Act is in need of an overhaul, but my concern is that the exemptions already written into the act are too broad, and are often used by administrators to conceal information which would clearly be of no harm if it were released to the general public.

The tenor of the Reagan Administration efforts to amend the FOIA frighten me. There are a great many arguments made, some before this very committee, that law enforcement efforts are being hampered because information cannot be kept secret. Now, it may

surprise you to know that investigative reporters in our state, especially at KSL Television, spend a great deal of time corresponding with the Federal Bureau of Investigation through the FOIA on many matters, including the matter of greatest concern to the FBI, organized crime. The FBI is, at least when it deals with reporters in Utah, extremely reluctant to give out any information, even under the present exemptions it enjoys.

An Example: Our investigative unit recently submitted an FOI request to the Bureau regarding an organized crime figure with possible ties to some very shady dealings in my state. The FBI, in our initial telephone conversations and through FOI requests, made it clear it would resist any attempts to release documents, even though the alleged organized crime dealings were nearly a decade old. We pointed out, however, that the particular person in question had been dead for seven years -- a much shorter period of time than the 25-year period of exemption currently being discussed in Senator Hatch's bill. The FBI, however, did not concede the point that the person was indeed deceased, but did say that if he was, certain information would be available under the Freedom of Information Act. The FBI required KSL to submit legal proof that the organized crime figure was dead, and told our reporter, Brad White, that if KSL could accomplish that fact, the material could be released. I'm certain the FBI was aware of the death -- if it wasn't perhaps our story should have been about the FBI's poor investigative techniques, not about the organized crime figure. KSL finally gave the FBI the proof it required, and the material was furnished. But it required some rather lengthy and innovative reporting techniques on our part to come up with that documentation, because it turned out the man's death was not a readily available part of the public record.

The point of that little example is to bring up the very purpose for which the Freedom of Information Act was passed in the first place. I'm sure I'm not telling you anything you don't already know or at least suspect, but government agencies will do almost anything in many cases to keep from giving to the press and public information to which it is entitled. The act was designed to require federal agencies to tell the public what's going on. The Administration Bill, with its sections to allow agencies to determine for themselves which information shall and shall not be kept secret, seems to me a violation of the very purpose of the Act. While these exemptions may be well intentioned, they can easily be broadened so that they are an unwitting tool to emasculate a law that has been of great benefit to the public.

I confess that the original bill proposed by the Senator from my state, Mr. Hatch, displeased me as much as the Administration's bill does. I consider his newest proposal, however, a substantial improvement and much less objectionable. My main concern with efforts to amend the Freedom of Information Act is the way agencies will use it to their advantage. It is no secret among journalists that bureaucrats do not like the FOIA; it forces them to divulge information that they would rather keep secret. When the original FOI Act was written and later amended, the exemptions therein WERE adequate. The very materials that many agencies are asking to have specifically exempted now are already exempt under the act. Addition of many new exemptions will only encourage them to bring other materials under the veil of secrecy.

I am reminded of an experience related to me by Will Fehr, who is now editor of the Salt Lake Tribune. Many years ago, Mr. Fehr worked for the U.S. Information Agency. His job was to read articles from foreign capitals in the New York Times and other major daily newspapers. He also had one other job.

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Journalists live and die in most cases by the public record. And by extension, so does the public. The public record is our tool to tell the public what is going on in government -- whether the government wants anyone to know it or not. I urge you today not to restrict us in those efforts. While a restriction through undesirable amendments to the Freedom of Information Act will only frustrate us and make our jobs a bit tougher, it will have a far more dangerous effect on the public. It will deprive the citizens of their right to know -- and, ultimately, their guarantees of freedom.

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Katharine Graham
Chairman of The Washington Post Company
Chairman and President, The American Newspaper Publishers Association

Address to the National Convention of SPJ/SDX

Good morning, and welcome to Washington. We are pleased that the annual meeting of the Society of Professional Journalists, Sigma Delta Chi, is being held in our nation's capital this year.

I think it is particularly important that you are meeting in Washington this year because of the unprecedented challenge being mounted to one of the most basic tenets of this organization. That goal was set out by the founders of this society in 1909, when they pledged to "work to safeguard the flow of information from all sources to the public, so that it has access to the truths required to make democracy function, and to protect our freedoms."

I must tell you this morning that this principle -- the presumption that a democracy works best when its government's actions are open to the scrutiny of the people -- is under the most serious attack in recent years.

Not more than a quarter of a mile from here, the Senate is preparing to hold what may be the final day of hearings on bills that would significantly curtail the Freedom of Information Act.

I do not, of course, need to tell this gathering of journalists how the Freedom of Information Act has helped reporters in their pursuit of the news. It was three years ago that this Society, together with the Reporters Committee for Freedom of the Press, created the Freedom of Information Service Center -- which offers advice and assistance to those wishing to use the federal Freedom of Information Act, and the various state open records acts. The increasing use that is being made of the Center is a pretty good measure of its value.

What I want to talk about this morning, however, is what I think the Freedom of Information Act symbolizes, and why I think any significant cutback in the Act would be a serious loss for us all.

The Freedom of Information Act, as an expression of national policy, embodies our commitment as a democratic society to open government.

In a perfect world, of course, there would never have been any need to spell out this fundamental principle in a statute. But before passage of the Freedom of Information Act in 1966, the world was far from ideal.

I was talking with a reporter the other day who recalled that while working on a story in the early 1960s, she had asked the Arms Control and Disarmament Agency for a list of members of its General Advisory Committee. A public information staff member told her: "We don't give out that information."

The reporter reminded the information officer that the list was in the agency's annual report which the reporter had misplaced. Even so, the government official still refused. When the reporter asked on what grounds the names were being withheld, the information officer disappeared for a few minutes, then returned and declared: "We claim executive privilege."

What this story illustrates (and every reporter who worked in Washington in those years has a similar tale) is that before passage of the Freedom of Information Act, government officials thought -- no matter what the request -- that it was perfectly all right to say "No."

I think the most important gain from the Freedom of Information Act is that it has largely changed this erroneous presumption.

The bipartisan coalition in Congress that drafted this legislation recognized, of course, that the public's right of access to information had to be very carefully balanced against all legitimate interests in national security, law enforcement, business confidentiality and personal privacy.

But the Johnson Administration, in a memo to all executive agencies shortly before the law went into effect, informed them the Freedom of Information Act left no doubt that disclosure was now the "transcendent goal."

Where too many government officials previously had felt that the burden was on the public to justify any request for information, the Freedom of Information Act made it abundantly clear that the burden was in fact on bureaucrats to justify any refusal.

That is exactly where the burden of proof should be.

None of us, of course, would claim today that the Act works perfectly.

Despite the admonitions of the Johnson, Ford and Carter Administrations to all executive agencies to meet the obligations of the Act in "spirit as well as practice," the fact remains that even today -- in some government agencies and departments -- bias against disclosure and an arbitrary preference for secrecy remain less the exception than the rule. Bureaucrats who oppose the principle of open government -- or who do not wish to disclose embarassing information -- continue to manage to circumvent the Act in a frustrating variety of ways.

The Reagan Administration, for its part, complains of the use of the Freedom of Information Act in "unintended" ways -- citing its use by business interests seeking unfair competitive advantage, by criminals seeking to thwart or undermine law enforcement agencies, and by foreign agents and others hostile to the United States seeking intelligence information. The Reagan Administration has proposed a wholesale overhaul of the Act to address these issues.

Certainly, if the Freedom of Information Act was indeed being seriously misused, I think as citizens we would be concerned with finding remedies. But in fact, the statute was drafted very precisely to protect fully these legitimate interests -- and I think the burden lies on those seeking to change it to demonstrate how these protections have failed. Is the Act creating problems for the nation's law enforcement agencies? The FBI has not cited a single instance where information released under the Freedom of Information Act has hampered an investigation.

Does the Act endanger our national security? Former CIA Director Admiral Stansfield Turner said in 1980: "Thus far, we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released."

What about trade secrets and business confidentiality? Well, the House Committee on Government Operations looked at this in 1978 and reported that "the committee has found no major abuses." The report went on to say that to the extent there had been difficulties, the problems had been in administrative procedures rather than in the substance of the law.

For the most part, I have to conclude that the problems that have been ascribed to the Freedom of Information Act are greatly overdrawn -- and the proposed solutions for the most part seem as unneeded as they are undesirable. The case for a sweeping overhaul of the Act simply has not been made.

That is not to say the Freedom of Information Act cannot be improved -- if what we really are talking about is improving it, and not weakening it. It can, of course, be made to serve all of us -- both in and out of government -- better.

I favor, for instance, the provision in S-1730 -- the bill introduced by Senator Hatch -- which would require the Office of Management and Budget to develop uniform fee schedules for all government agencies. At the present time it is virtually impossible to anticipate what fees will be charged when one attempts to use the Freedom of Information Act. Legislative language also should clearly state that fees ought not to be used to discourage requests, or to be imposed as obstacles to disclosure of requested information. I think it also important to strengthen provisions for waiver of all charges where the information would primarily benefit the general public.

I also support establishment of procedures to allow persons submitting information requested by the government to oppose release of that information to third parties. The Administration's proposal -- which would allow parties unilaterally to stamp all documents they submit "confidential" -- clearly invites abuse. But I feel it is only fair that a party be notified and allowed to object when a request is filed on information it has provided the government, and that a ruling be made in a reasonable period of time.

But the thought I want to leave you with today is that the major effort underway to modify the Freedom of Information Act -- to roll back, to a great extent, the presumption of openness -- is an effort that must not be allowed to prevail.

It is impossible to quantify the value of this Act either to the press, or through the press to the American people. The impact of this Act certainly can not be measured by the number of freedom of information actions that journalists have filed. Every time a reporter walks into a government office -- and is handed a document that otherwise might arbitrarily have been withheld -- society has benefited from the presumption of openness codified by this Act.

No single statute has ever given the citizens of a democracy a better window on their government. The Freedom of Information Act says to Americans -- and to the World -- that the business of government in a democracy is the people's business.

Upholding that principle -- preserving that guarantee of public access to government records -- is of overriding importance to us all.

Our government must remain committed to the benefits of openness. The societal benefits which derive from the availability of information concerning the functioning of government must be protected.

Nothing so diminishes democracy as obsessive and needless secrecy. Never has it been as important that the right of people to know the actions of their government be secure.

Thank you.

Senator HATCH. Thank you so much.

At the outset, let me remark that you have all made some excellent points. For instance, I agree that we should not use this very delicately balanced legislation to solve some difficult privacy cases pending in the agencies involving deceased public figures. There are several FBI cases involving privacy rights of deceased individuals such as Dr. Martin Luther King, Charlie Chaplin, and other figures. Those rare and specific instances, and the privacy rights of other surviving families, should probably be handled on a case-by-case basis, rather than treated legislatively.

Another good point is that the press should receive expedited access whenever possible. We are going to try to see that that occurs.

Moreover, I agree that any 90-day statute of limitations is probably too short. These are just a few of the suggestions in your written statements that deserve primary consideration in any final bill that we put out of this subcommittee and out of the full committee.

Let me just discuss one area further though, and that is FOIA's sixth exemption. It protects against clearly unwarranted invasions of personal privacy. You have stated that you see no need for further protection of individual privacy. I wonder if you approve of cases such as *The Washington Post* v. *The State Department,* which found that the Government could not protect the identities of Iranian nationals with U.S. citizenship, even if they might be subject to retaliation?

Do you approve of *Simms* v. *CIA,* the case which held that the Government could not protect the names and biographies of foreign service personnel from disclosure, despite the obvious potential for physical harm in the course of their service?

I would be happy to have any of you or all of you answer that.

Mr. ROWE. Senator, I am by no means an expert on the case of the two Iranians whose citizenship the Washington Post was questioning through the State Department. I know a little about it.

My short answer to your question there is that I think secret citizenship would be an anathema. I just cannot conceive that the U.S. Government would permit the bestowing of citizenship without it being a full public record.

I think it is true that the Immigration and Naturalization Service in fact did confirm a couple of years ago to the Washington

Post the fact of citizenship of at least one of the two individuals concerned in the request to the State Department.

The fact that these individuals did carry U.S. citizenship is really not a secret as far as having never been divulged at any time in any place. "Time" magazine in May of 1979 quoted the wife of one of these Iranians as saying that she would remain a U.S. citizen and she expected her husband would retain his U.S. citizenship.

In a book that I think will soon be published, Ambassador William Sullivan's "Mission to Iran," I am told that on page 200 Ambassador Sullivan states that one of these Iranians, a gentleman named Yazdi, lived in Houston, Tex., for many years and acquired U.S. nationality. In a book that I think is soon to be published by John Stemple of the State Department Operations Center, entitled "Inside the Iranian Revolution," he makes the statement that Mr. Yazdi has never renounced his U.S. citizenship.

I cannot understand why the State Department, in view of all the publicity that has been given to the citizenship of these two individuals, is stonewalling on that request.

Senator HATCH. As you know, the issue involves a question of privacy and the impact that would occur on the individuals if their citizenship or dual citizenship were disclosed. That may be the problem.

Mr. ROWE. Identities have been disclosed by these other publications. Disclosure is an accomplished fact.

Senator HATCH. Of course, I think the point that is made is that, although identities and citizenship may already have been disclosed, the Department of State has not confirmed that those disclosures were accurate or true. Such a confirmation could jeopardize the lives of those concerned. That is a powerful privacy interest. Highlight it this way for a moment: Aside from the legal nuances, do you not think that you would want your own privacy protected if your name showed up in a Government file in a manner that would violate your own privacy?

For instance, would you not object if you were accused but not in fact involved in bribing Government officials to get a story? Disclosure of such an erroneous accusation would certainly violate your right to privacy, but it would not be true. What would you think about that type of situation?

Mr. ROWE. I would like the opportunity to defend myself, if such an accusation were made.

Senator HATCH. There is no question about that.

Mr. ROWE. If I am not aware the accusation has been made, there is no way I can defend myself. I would like for it to come out, if anybody ever made such an allegation against me.

Senator HATCH. Would anybody else care to comment?

Mr. CONY. I would be very relaxed about your invading or challenging Mr. Rowe's privacy in such a matter. I might be a little less relaxed if you were talking about Ed Cony. I have to admit that. I do think, however, that there is a balancing factor, and that is, again, the public interest.

Let us take the case of some of the businessmen who may or may not have committed bribery to get business overseas. We know that in some cases they did apparently; they had admitted it; in other cases they have not.

I think there is a legitimate public concern about how some of our major corporations conduct their business. Even though obviously it is very painful for an executive or a sales agent for that company to have that identification I think it is also important for the American public to know something about investigations where a decision not to prosecute was arrived at. Those are difficult decisions, and there is a balancing act, but I think we should not forget that there is a public service aspect of this.

Senator HATCH. That is what these bills are trying to do—rightly or wrongly, balance the public interest against private interests in the best possible way. I have to admit that I found it to be a very difficult process, trying to arrive at a final conclusion that really is a pleasing conclusion to all concerned or at least a workable conclusion for all concerned.

We all know how valuable confidential sources are to newsmen. Of course, when you are dealing with confidential sources, you, as a matter of policy, promise them confidentiality and privacy. I think you would have to admit that your news-gathering function would be severely inhibited if your secret sources could not be promised confidentiality.

The FBI claims that this is not all that different from their problem. I do not know what they are going to say today, but they claim that, whether or not disclosure is made of confidential sources, that is the perception of the informants across this country.

Almost all law enforcement officials who have testified before the subcommittee have said that they have had a drastic reduction in informant testimony and a drastic lack of cooperation with local and State law enforcement agencies. Federal law enforcement agencies have had this kind of reduction to the point where it is a very difficult thing for them to acquire information to enforce the law. Again, we are trying to balance this.

Ernie?

Mr. FORD. Let me reply to that inasmuch as I do deal, indeed, in a lot of confidential sources in my day-to-day work.

The Drug Enforcement Administration which, as I mentioned in my testimony, relies on confidential informants practically more than any other agency, did a study last year and the first part of this year of 3,000 cases where disclosures had been made under the FOIA and reluctantly conceded after a while that none of their confidential sources had been compromised by the FOIA, or at least none of them said they had, although some of them said they had been compromised.

I suspect that there is a problem in the FBI, indeed, with confidential sources being disclosed, but I think the FOIA is taking an unfair rap for that.

If I were a criminal—and, Lord knows, I have been accused of being one on occasion—I would be much more concerned with cases like the ones in Cleveland and Chicago where the FBI caught its own employees feeding organized crime raw data right out of the files. If I were a confidential source of the FBI, I can assure you, I would be much more concerned about that than I would about the Freedom of Information Act.

Senator HATCH. I think they are very concerned about that, too. There is no question about that.

Let me pose another question.

In the interests of encouraging legal settlements, the administration bill contains a new exemption covering all information generated in connection with such settlements. Without this kind of exemption, parties to a legal suit may very well be reticent to share information, fearing that the submitted information may be subject to the Freedom of Information Act after settlement.

Do you think this exemption makes sense, and should we not encourage legal settlements in this fashion?

Mr. CONY. I did not catch which exemption you meant.

Senator HATCH. We are talking about the new exemption that is contained in the administration bill which covers all information generated in connection with the encouragement of legal settlements.

Mr. CONY. These are cases where the Government is involved?

Senator HATCH. Yes, they are all Government cases.

Mr. CONY. We are on record as opposing that strenuously. I think any time the Government makes a settlement with an individual, a company, or any organization, we need open justice in this country. Who knows what kind of a deal has been made? I think this would be an horrendous development.

Senator HATCH. Ms. Otto?

Ms. OTTO. I strongly concur in that. I think the public has a right to know what are the provisions of a settlement that Government makes. It has no other way to judge whether its interests have been served.

I think, for example, if an A.T. & T. settlement were made, everybody would have a very strong interest in knowing.

Senator HATCH. However, as you know, the public can know, because the court documents will contain the provisions of the settlement. So it would be a simple matter of going to court and getting a copy of the settlement papers. It is all the underlying and background material that the Government does not want disclosed in the interest of trying to encourage settlements.

Is that, in your opinion, a reasonable consideration for us to make as members of this subcommittee and as members of the full Judiciary Committee?

Ms. OTTO. In my view, the proposal is much too broad and should be limited. Sometimes it is that information that they seek not to release which makes clear what is released. It is essential to have both.

Mr. CONY. It seems to me, Senator, that those details that would be withheld but which presumably influence the final decision are vital for the public to know if the public is to have any good way of appraising the quality of justice being dispensed in this country. I think almost nothing should be secret in terms of the judicial process.

Senator HATCH. Are there any further comments any of you would care to make?

[No response.]

Senator HATCH. I want to congratulate you and thank you for being here today. We appreciate your testimony. We will pay par-

ticular attention to it. Keep in mind that the job of this subcommittee is a very difficult one, because we have to balance the testimony that we have received.

I was originally taking this testimony at the appointment of Senator Thurmond and Senator Eastland back in 1977. The Secret Service testified that, as a result of the drying up of informant testimony caused by the Freedom of Information Act, they only had maybe 25 percent of the informant testimony they had formerly had. They said they recommended to the then-President of the United States, President Carter, that he not go into at least two cities in this country, because they lacked sufficient information to protect him.

Then, when we took testimony just a short while ago from the same Secret Service, they indicated that that condition had deteriorated since 1977.

These are some of the problems we have as committee members. They are not easy. I can respect the feelings of the press that everything should be public. I understand that, and I do not blame you for feeling that way. I hope you understand some of the problems that we have on the committee as well.

Thank you so much. We are glad that we could have this extra day of hearings and give you this opportunity to testify.

Senator HATCH. The subcommittee is now very honored to hear from Mr. William Webster, Director of the Federal Bureau of Investigation.

In 1970, Mr. Webster was appointed judge of the U.S. District Court for the Eastern District of Missouri and in 1973 was elevated to the U.S. Court of Appeals for the Eighth Circuit. He resigned in 1978 to become the Director of the FBI.

In 1972 Mr. Webster received a Washington University alumni citation for contributions to the field of law, and in 1977 he received the Distinguished Alumnus Award from the Washington University Law School.

Mr. Webster, we want to thank you for being with us today. We, as always, will look forward to taking your testimony at this time.

STATEMENT OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Mr. Chairman and members of the subcommittee, I last testified before a congressional committee about the Freedom of Information Act on February 28, 1979. During that appearance, I described some of the problems which the act poses for the FBI.

In response to requests from several of our oversight committees, I prepared some proposed amendments to the act, and with the permission of then Attorney General Bell, sent them to those committees with oversight responsibilities. I think the chairman will recall that report.

Senator HATCH. I do.

Mr. WEBSTER. All the while, the Bureau worked closely within the Department of Justice. Judge Bell initiated a Government-wide study of the act. We participated in that undertaking. Then we worked with Mr. Civiletti and his staff as they prepared proposals to amend the act.

We continued to work within the Department after the change of administration as those newly elected or appointed to office studied the matter and drafted the proposals Assistant Attorney General Rose presented to this subcommittee a few weeks ago.

All that time and effort is an indication of how serious a matter I think the problem is. I am pleased that you are holding these hearings and that you have invited me to testify.

Others should be pleased as well. We need look no further than court decisions reported in the past few years to see that members of the judiciary have suggested Congress should take another look at the act.

The August 17, 1981, report of the Attorney General's Task Force on Violent Crime, chaired by former Attorney General Griffin B. Bell and Governor James R. Thompson, recommended that the "Attorney General * * * seek amendments to the Freedom of Information Act to correct those aspects that impede criminal investigation and prosecution and to establish a more rational balance among individual privacy considerations, openness in Government, and the Government's responsibility to protect citizens from criminal activity."

Mr. Chairman, in my judgment Attorney General Smith has addressed many of the problems which have been identified.

Disagreement over the nature and degree of the changes to be made is to be expected. Some will maintain the proposals go too far; others will argue they do not go far enough.

A comparison of Mr. Civiletti's proposals with those before us today reveals one fact about which there should be no disagreement: Change is necessary.

The former Attorney General and the present administration agree that changes are needed. Both agree special protection should be afforded records pertaining to foreign counterintelligence, organized crime, and terrorism. Both agree confidential sources need additional safeguards. Both agree the time limits should be adjusted. Both are so similar and consistent, not only in the identification of problems but also in recommended solutions, that it is clear the issue before us is what adjustments to the act should be made in the light of reason and experience.

I would like to address the provisions for expanding protection for sources and removing records pertaining to foreign counterintelligence, organized crime, and terrorism—the most sensitive information we have—from the mandatory disclosure provisions of the act.

Most of our foreign counterintelligence, organized crime, and terrorism investigations are deailed and extensive. As a result, they are more vulnerable to analysis by those who have something to gain from trying to identify sources and to ascertain the scope and limitations of our efforts. Groups of individuals are free to pool our releases and subject them to detailed analysis.

In these highly sensitive cases, even acknowledging the absence of information in our files can be damaging. The lack of investigative activity in a particular place within a certain time frame announces we have no knowledge of what transpired there. Moreover, information that is released can form a blueprint of the Bureau's

investigation and techniques. When it is necessary to reinstitute the investigation, the target is forewarned and forearmed.

Finally, the violence and risk of reprisal in these areas are sufficiently great to increase the impact on informants whose perception is that we may not be able to protect their identity.

You may be interested to know what we have released in response to Freedom of Information Act requests in connection with the Weather Underground. Over 60,000 pages of FBI documents have been released to a west coast attorney who represents individuals connected with that organization. Of those arrested in connection with the murder of two police officers and a Brinks guard, two have Freedom of Information Act lawsuits pending against the FBI at the present time.

When we processed documents for the Weather Underground, we reviewed them carefully, as we review all documents carefully before we release them. We do our best to apply the exemptions to the fullest extent of the law. If the information came from a foreign government, we delete it. If it was provided to us in confidence by a local or State police officer or department, we delete it. If it was by furnished by an informant, we do not release it.

The FBI does not know and has no way of knowing with certainty to what extent those 60,000 pages of FBI documents assisted those involved in the recent Brinks robbery. We do know that two of those apprehended had received documents and were suing us, as I mentioned earlier.

On November 2, 1979, Joanne Chesimard escaped from prison where she was serving her sentence for killing a New Jersey State trooper. She left behind in her cell about 1,700 pages we had released to her under the Freedom of Information Act. New Jersey authorities who studied those documents are convinced the information she received made the task of apprehending her again most difficult.

I cannot say whether or not the Freedom of Information Act has assisted Joanne Chesimard in her successful attempt to frustrate the efforts of law enforcement to apprehend her. I do know she was reading the documents when she escaped, and I do know that she remains at large.

My efforts to report to Congress the problems the act is causing the FBI have been criticized by some as causing sources to fear their identities will be disclosed, thus exacerbating the problem the FBI has experienced. Others have argued at the same time that we must put more evidence of harm caused by the act on the record if we are to justify change.

Obviously, it is very difficult to both build a record for change and prevent the aggravation of the serious problems we are experiencing among our information sources. I can only note that we have always attempted to build our case in a responsible fashion, consistent with our responsibilities to our sources and without attempting to overstate or overdramatize the problem. We have been and remain very aware of the limitations on what can be stated publicly without compromising important law enforcement interests.

I do want to state publicly it is my firm conviction that foreign counterintelligence, organized crime, and terrorism information

should be removed from the mandatory disclosure provisions of the act. The stakes are too high; the risks are too great. Our accounting in these sensitive areas should be made not to the world but to the people's representatives in Congress.

Criticism of this proposal appears to focus on two issues. The first is whether the Attorney General or the Congress should define foreign counterintelligence, organized crime, and terrorism. The second is whether the proposal would permit the FBI not only to resurrect the old counterintelligence program, Cointelpro, but also to hide the evidence from the American people simply by placing any document we wished to hide in a foreign counterintelligence, organized crime, or terrorism file.

I do not see any great controversy arising over the question of who should define the terms. I proffered definitions myself in a package of proposals which I sent to you in June 1979. Because Attorney General regulations and orders can be more flexible than statutes, the administration proposal would permit the Attorney General to define the three terms.

It should be noted that title 28, Code of Federal Regulations, section 50.8, will remain in effect. This section provides for access to files of historical interest. Incidentally, we were processing thousands of pages for release under this section when the act was amended in 1974.

If the committee has reservations about the present or potential scope of this proposal, we would be very willing to work with the committee in defining these terms.

What is essential, in my view, is that Congress conclude, as did both former Attorney General Civiletti and this administration, that these three species of investigations merit special protection.

Let me speak now to those who are concerned that this proposal would permit the use of the act to conceal illegal conduct or activities. I can assure you that it will not.

It is Department of Justice policy that the Freedom of Information Act exemptions cannot be used to withhold evidence of illegal or improper conduct. There will be no change in that policy whether or not this bill becomes law.

The courts have made clear that an agency cannot apply that act's exemptions to incriminating evidence. Those judicial decisions will be unaffected by congressional action on the bill.

Furthermore, this bill does not create an abyss into which all our foreign counterintelligence, organized crime, and terrorism records would fall, never to see the light of day.

The bill would not permit the FBI to place a file beyond the reach of the Freedom of Information Act by stamping "Organized Crime" on the file cover. We would be required, as we are today, to review each and every document in that file. Then we would have to make a determination whether the information in those documents met the criteria established for organized crime information.

For each and every item of information we concluded did meet that standard, we would be compelled to notify the requester of our determination that exemption (b)(7)(G) justified our withholding that information.

Under the bill, the requester retains his existing right to demand a de novo review within the Department of Justice of all our inter-

nal determinations. That means a Department of Justice attorney would examine all the information we were withholding under the organized crime exemption.

The bill also carefully preserves the requester's existing right to bring suit in U.S. district court and to have the court consider the entire matter de novo. As is the case today, the court at its sole discretion could review all the files and all the documents.

I should like to emphasize as strongly as I know how that this bill does not change or restrict in any way the existing power of a court to examine FBI documents. While the administration proposal would affect the Government's burden in proving a classification determination, the proposal would not limit the power of a court to examine documents. Whatever a court can see today, it could see the day after this bill is enacted into law.

Additional safeguards exist as well.

The Privacy Act of 1974 strictly controls the FBI's collection, maintenance, and use of information about individuals. That statute prohibits, among other things, disseminating information about an individual without that individual's written permission, unless the dissemination is made pursuant to one of the narrowly drawn exemptions to the act, including the routine use provision. The FBI is required by the act to publish in the Federal Register all its routine uses of information. Civil and criminal sanctions put teeth in these restrictions.

Moreover, we can all agree that congressional oversight of FBI operations far exceeds in scope and intensity what it was a few years ago. The Senate and House Appropriations, Judiciary, Intelligence, and Governmental Affairs Committees regularly exercise oversight responsibilities over the FBI. There are many other committees and subcommittees which review FBI operations on an ad hoc basis.

I have personally appeared and testified before congressional committees at least 39 times since I became Director in 1978. During that same time, FBI officials testified on 92 occasions. Further, FBI representatives have provided many informal briefings for members of our oversight committees or their staff and have responded to numerous written requests for information.

The General Accounting Office has conducted several studies of various FBI programs. It has undertaken more than one review of our FOIA operations. One such study took more than a year to complete.

The point I am emphasizing is that there is extensive oversight of the FBI. There exist today internal controls and oversight within the Department of Justice itself. This bill would change neither. There exists legislation with civil and criminal sanctions which controls the FBI's collection, maintenance, and use of information. This bill would not change that. There exists judicial oversight. This bill would not change that. There exists vigorous congressional oversight of the FBI. This bill would not change that.

Before fears over improprieties could be transformed into reality, there would have to be a total and simultaneous breakdown of all the existing checks and balances in the executive, legislative, and judicial branches of the Federal Government.

Mr. Chairman, these proposals will not solve all our problems with the act. They would protect many legitimate law enforcement interests while carefully preserving existing safeguards and insuring that the people will have all the information the security of the Nation permits.

I urge that these proposals be enacted into law.

Senator HATCH. Thank you, Judge Webster.

As a courtesy to Senator Grassley, who needs to go to another meeting, I am going to have him ask some questions right now, and I will be right back.

Senator GRASSLEY [acting chairman]. Director Webster, are there any examples of judges not viewing classified information in their chambers rather than for the public record?

Mr. WEBSTER. I missed the last part of that.

Senator GRASSLEY. Whether or not they view them in their chambers rather than in the open for the public record.

Mr. WEBSTER. I think that most judges have conformed to the requirements and intentions of the statute with respect to in camera viewing of classified information.

I am aware of two examples, in one of which a district judge, I am sure inadvertently, quoted in his formal opinion from portions of classified documents. I am aware of another case in which the district judge ordered the disclosure of an in camera affidavit. But he later vacated that order on motion, and it did not occur.

Senator GRASSLEY. I suppose the next question I ought to be asking of the CIA, but I probably will not get the opportunity to do it for the public record. I would like to ask you. It is my understanding that there is a perception on the part of foreign intelligence officers and foreign sources of information that secrets are not protectable under the FOIA. Do you think that this can be solved by amending the FOIA?

Mr. WEBSTER. I suppose that that question is always going to be out there because of some general skepticism among foreign law enforcement and intelligence agencies about our American concept of openness in government.

Wherever I go and whenever I am visited by officials from abroad, this question invariably comes up. We go to great lengths to reassure our friends in foreign agencies who supply important information to us, in connection with our foreign counterintelligence responsibilities and also in connection with world travelers engaged in crime, that we can and we do protect the source of the information under existing exemptions.

They do not see in many cases the commitment to this, and I am confident that the kind of amendment that has been proposed would help materially in their perception of what we are able to do in terms of protecting their information along with other foreign counterintelligence information.

The short answer is that it would help.

Senator GRASSLEY. Is it not true that this perception that you talked about is probably as much based upon fears of leaks of congressional oversight of the publication of CIA memoirs, whether they be censored or uncensored, civil law suits, and a lot of other factors that really do not have anything to do with the Freedom of Information Act?

Mr. WEBSTER. That would be speculation on my part. I am sure that all the things you have mentioned contribute to a sense of unease, if that is the word, but there is very little that I can think of with reference to the FBI in that type of category relating to foreign information. The focus there is on the FOIA. I do not think we have a track record for writing books and that sort of thing that disclose foreign source information.

Senator GRASSLEY. Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Webster, thank you for your statement and also for the information and briefing that you have provided for members of the committee. I would like to urge my colleagues to take you up on your offer to present another briefing here or at the Bureau.

Can you be specific in these hearings as to the effect of the amendments in the Hatch bill or the administration bill on our ability to wage a stronger battle against organized crime? What would you see, if one of these bills were adopted, would be specific areas which would provide the Bureau with a better thrust in that area?

Mr. WEBSTER. As I know the Senator is aware from past experience, getting at organized crime has been a tremendous challenge for us. No other similar apparatus is better insulated and better protected at the higher levels.

We have enjoyed some significant successes in the last 18 months, most of which we can attribute, at least initially or throughout the investigations, to source information and undercover work. It sometimes takes years to develop that kind of information and put it in place at a level where we can actually find evidence, not just rumors but evidence, that we can use against top figures in organized crime.

You did not come here to hear me tick off our successes, but the importance has really come home to me in this area. It is a dangerous area. Reprisals are severe and sometimes terminal in terms of the objectives and threats where informants are concerned. They need to know that they are going to be protected and that their names will not find their way into organized crime hands. They need to be very satisfied about that. Otherwise, we are not going to get the information.

Senator DECONCINI. Is that a hindrance today?

Mr. WEBSTER. It is an enormous hindrance today, because they are aware that organized crime officials have, either on their own behalf or by using other intermediaries, sought this type of information and tried to identify those who were giving that kind of information.

They need to be reassured that every reasonable step that can be taken by Government—and that includes the Congress—has been taken for their protection. There are going to be risks in any event, but they should not be needless risks.

Senator DECONCINI. Director Webster, if an organized crime organization was anticipating going into some new venture—narcotics, extortion, or whatever—and they had a small group of decisionmakers to implement this plan, would it be possible for one or more of those organizers to find out, through the Freedom of Information Act, whether or not any of them were suspects or whether

any investigation was ongoing either as to them personally or as to the type of activity they might be anticipating?

Mr. WEBSTER. One of the favorite ploys is to try to ask for a file and then see if we withhold it and what the exemption basis is. We have to state what the exemption is. Presently, if we say the basis is an ongoing investigation, they already have the information they want.

Senator DECONCINI. And that happens; is that correct?

Mr. WEBSTER. Yes, it does.

Senator DECONCINI. Has anyone involved in organized crime used an alias to find out whether or not there was an investigation into any contacts that he might have?

Mr. WEBSTER. The way the law is written, we have no basis for running a name back.

Senator DECONCINI. You do not know whether or not aliases are used?

Mr. WEBSTER. That is right.

Senator HATCH. Could I interrupt just for a minute?

Senator DECONCINI. Certainly. I yield.

Senator HATCH. I understand many of your dilemmas. You said in your opening statement that you had reached the limit of what you could say publicly about the FBI's problems in trying to protect informants. On the one hand, if you illustrate the problem too vividly, you may be furnishing ammunition to those who would like to make sure no one in their group becomes an informant. On the other hand, if you fail to give concrete examples to Congress, you run the risk of not making a convincing argument for amending the act.

The journalists who testified prior to your coming here raised the issue quite strongly that the FBI cries wolf but rarely shows any concrete illustrations.

I wonder, without naming names, if you could provide for the subcommittee some examples of informants who have been identified as a result of the Freedom of Information Act. Maybe you could use hypotheticals; I do not care how you do it. If you could give us some examples, I think that would help.

Mr. WEBSTER. Mr. Chairman, I think I could reasonably anticipate that kind of a need on your part, and I have some information that I am in a position to give you. It is sanitized a little bit, so we will not try to point fingers at conditions that are still around us. And I would be glad to give more details in executive session to you.

Senator HATCH. Let us get what we can in nonexecutive session.

Mr. WEBSTER. Yes. We will go through a few of these. It is broader than just a specific identification of a particular informant. It is: Can they reasonably be concerned about our ability to protect them?

Walter Cronkite testified in connection with the "Stanford Daily" litigation. It is the chilling effect of the perception that, "If anybody could be identified, why not me?" They need firmer, clearly set parameters so that they know we can protect them and so that our agents, who will not go out and lie to their informants, can say with confidence and can build an informant base with confidence, that we can protect them.

We have identified informants who have told law enforcement and intelligence agencies that they will not provide information because they fear their identities will be disclosed through the Freedom of Information Act.

I have not gone back in detail, but in the report that I sent to you, Mr. Chairman, and others 2 years ago, I filed an appendix with paragraphs of particular cases that had been collected and reported back to us, not on a quota basis but by the individual offices, because I knew 2 years ago I was going to have to make this kind of case.

We have examples of situations in which individuals have claimed that they have identified sources through the act. They come and say, "We have figured this out," either talking to us or talking to the person who is the presumptive source. I have examples in which investigations have been harmed as a result of the act.

I think Senator DeConcini made reference to the visual demonstration that we have prepared. We prepared an initial demonstration to test our own assumptions on how vulnerable we were to this type of logical analysis of multiple records. We have used it at our own training at Quantico. We have made a demonstration available to you. I think that it graphically portrays some of our problems with respect to the act.

In one example—and I am shortening these, and it takes a little of the color and the tensions that exist out of it, but I have to do it that way—an informant told us that he was confronted by a convicted felon who showed him a document released to him under the FOIA. The felon accused him of being an informant, and he threatened him, so the informant moved out of the State.

Drug Enforcement Administration agents were attempting to obtain information from a potential informant, and thus far he has refused to be of assistance. He has told the agents that after his own arrest he made an FOIA request and that he identified the informant who was responsible for his arrest. He is afraid that if he cooperates with DEA anyone arrested will be able to identify him as the informant because he was able to identify his own informant.

A newspaper made a request and received some documents, and it printed a story which contained this sentence: "Though many of the names have been blacked out by FBI officials, other documents indicate that a Salt Lake City resident"—and I will not list the name here—"was the FBI informant." And they listed the name.

After studying one of our releases, a researcher with detailed knowledge of the subject matter claimed he was able to identify the individuals whose names we deleted. He wrote an article criticizing those who had cooperated with the FBI.

A source spoke to an FBI agent. The source was extremely upset. He said he had received a telephone call from an individual who told him he had just received his FBI file and it identified him—that is, the source—as an FBI informant.

Although we had invoked the confidential source exemption during processing, the individual had somehow identified our source. That is always the problem that we have in the hard line

that the statute now takes. We do not know what the requester knows.

Senator HATCH. So he may be able to piece things together from information received in an FOIA request. How many people do you have working on these Freedom of Information Act requests?

Mr. WEBSTER. Three hundred employees full time at headquarters, plus individual agents in the field.

Senator HATCH. I take it every one of those has to make value judgments every day as to what should be excised from a sensitive record.

Mr. WEBSTER. We supervise, of course, and they go through a filtering process and checking process. We do the very best we can.

Senator HATCH. But there are a lot of human errors; is that what you are saying?

Mr. WEBSTER. There is a great potential for human error. For example, in the *Rosenberg* or *Meeropol* case, where the judge ordered us to release documents at the rate of 40,000 documents a month, in that one case—there is bound to be some pressure on time to comply with the statute.

Senator HATCH. Is there any way you can be absolutely sure of not disclosing an informant when releasing 40,000 documents a month?

Mr. WEBSTER. No; you really cannot.

There is a certain amount of testing that goes on because of this. There is a lot of conversation in the street about who were the sources of information.

The defendants and suspects in a DEA case included an experienced ex-police officer, a defense attorney specializing in criminal law, and an experienced drug dealer. All were constantly armed and violence prone. The ex-police officer had submitted FOIA requests regularly for a considerable period of time.

As the investigation continued, the attorney and the drug dealer began to submit FOIA requests. The attorney was well aware of FOIA and the manner in which it can be exploited to determine whether or not there was an ongoing investigation of the suspects and the methods by which an informant could be identified.

Several informants in the case learned that the subjects were submitting frequent FOIA requests. Two became frightened and ceased providing information and fled out of the State. It was a good ploy on their part. All the defendants escaped conviction. They were convicted in a separate case.

You know, you see something like "green sedan," which is something I use in talking to the agents. "Green sedan"—we cannot say that will identify an informant. Our 300 employees do not know the person who is requesting the information. They do not know what is significant about a green sedan. So they are supposed to leave it under the statute.

That is the kind of situation we are confronted with when we have no latitude, in a sensitive investigation, such as organized crime, foreign counterintelligence, or terrorism.

Senator DECONCINI. If the Senator would yield? Just to follow that up, Director Webster, are you saying that to some people the words "a green sedan" would identify a certain person or a certain informant?

Mr. WEBSTER. Absolutely. He would know.

Senator DECONCINI. This identification would thereby jeopardize the safety of the person identified and the success of any continued investigation you were conducting if he were your sole source of information?

Mr. WEBSTER. Exactly.

Senator HATCH. Was that an actual situation, or is that just a hypothetical?

Mr. WEBSTER. I think that is a hypothetical one, but you could substitute an address or a geographic location.

Senator HATCH. Was there not one where they just mentioned the sex of a person and that identified the informant?

Mr. WEBSTER. That is right. It is a simple process of elimination.

We have had situations where there were three people at a meeting and two show up as suspects. It does not take much imagination to figure out that the third one, since he was not a suspect in our investigation file, was probably the informant and can be confronted then by the other two or by their agents.

Senator HATCH. Especially if they have a document from the FBI saying that one of the three——

Mr. WEBSTER. That is right. The document just listed two people, and they know that there were three people at that meeting.

Senator HATCH. Yes.

Mr. WEBSTER. In the 95th Congress, Mr. Jerry Bowdach, an admitted organized crime figure, testified before Senator Nunn's Government Operations Committee. He testified that he made an FOIA request—and I am quoting—"to try to identify the informants that revealed information to the agencies." Senator Nunn asked him if he wanted their names so that he could murder them. Mr. Bowdach said, "Yes, sir." When asked if this kind of motivation is prevalent with organized crime figures in the penitentiary, Mr. Bowdach responded, "Absolutely."

Bowdach went on to describe how he and other inmates went through about five pounds of documents released under FOIA and through analysis learned that the deletions were not totally complete. He stated that an individual had been identified in this exercise.

That is the same one where I keep hearing about people saying, "Well, they did not identify him enough because they killed the wrong man," because the identification was figuring out how many letters were in the deleted section and it turned out to be a symbol number rather than a name. That does not give me very much comfort, and it certainly does not give our informants very much comfort if the wrong man got murdered.

Colonel Clinton Pagano, the superintendent of New Jersey's State Police, wrote to me shortly after Joanne Chesimard escaped from the Clinton County Correctional Institution in November 1979. He did not really wait to write: he picked up the phone to call me, and then he wrote to me.

Chesimard, as I mentioned in my opening statement, was serving a life sentence for the execution style murder of a New Jersey State trooper. Following her escape, prison authorities found in her cell numerous FBI records acquired by Chesimard under the FOIA. After reviewing these records, Colonel Pagano concluded—and I

am quoting him now—"Our efforts to apprehend this fugitive have been impaired, and the working relationship between the New Jersey State Police and the FBI has suffered accordingly. Without question, Joanne Chesimard has an in-depth knowledge of the procedures of your agency which she will use to elude apprehension."

Many other people feel the same way about it. I am aware of another case in another part of the country where police officers had important information relative to a foreign counterintelligence investigation and would not give it to us because they did not believe we could protect the source.

Senator HATCH. I take it you had additional information that might have been able to resolve some of the problems.

Mr. WEBSTER. That is right.

Senator HATCH. But you were stymied because of the failure to cooperate on behalf of the local law enforcement people.

Mr. WEBSTER. I have another case in which a man with a long history of felony arrests and convictions has used the act repeatedly in what is obviously a systematic manner to zero in on an informant. I cannot discuss this case in public, because it is too sensitive and the people are still in a position to engage in reprisals.

The systematic elimination would make you realize that this is a ripe target for anyone who likes crossword puzzles or ordinary challenges of analysis to try to take these documents and find the missing link. They have something that we do not have, and that is the extra knowledge. We do not know what the extra knowledge is.

In the package of proposals that I submitted in 1979 are just pages and pages in which people in all segments of society refused to provide us with information that they feared could be revealed under the act.

I think one of the saddest experiences that I had in the first year that I came here was with personal calls and telephone calls by Federal judges, all friends of mine, who claimed that they were very sorry but they did not want to be interviewed by FBI agents about candidates for judges to sit on their courts. They said they had read the act, they understood the act, and they knew that there were going to be these nice line-by-line, word-by-word deletions, that the new candidate had every right to ask for his file under the Privacy Act, and if he was confirmed and got on the bench he would be spending the rest of his life with him, knowing that that particular judge had derogatory comments to make about him. So the judge, rather than put up with that, defaulted in his public responsibility to make us aware of the deficiencies in a judicial candidate.

Senator HATCH. This, of course, makes it very difficult for us here on the Judiciary Committee when we have so many judgeships coming before us constantly.

Mr. WEBSTER. We have to come to you with the best that we have. Sometimes it is not the best, for just this reason. We tell everybody that they have a promise of confidentiality.

Senator DECONCINI. Mr. Chairman, let me interrupt for a moment with a personal experience along that line under the previous administration. I suggested a nominee for a U.S. Federal court which was not sent up here, but, in fact, the FBI did do a

background check on the individual. The individual asked for and received permission for me to get the file.

I noted in reading it that there were Federal judges, prosecutors, and police that gave positive information and that gave negative information on this individual. Although their names were crossed out, if you were familiar with the community and with the proposed nominee, you would have no question that it was Judge So-and-So sitting on this court that said this, who had made a certain statement whether it was for or against the individual. It was a very difficult situation.

Had the man been put on the court, the situation would have been even worse because one of the people who had made derogatory comments happened to be on that court.

Senator HATCH. I have looked at those FBI files, and I have to admit that such information is readily available for anybody to see.

Senator DECONCINI. I intend no criticism of the FBI; they were just doing their job. But it certainly was not difficult to figure out who was making these statements.

Mr. WEBSTER. We are just following the statutes and the limitations of the statute in its present form.

We have polled our agents in the field to see what their sense of it is. We took a representative sample of about half of our total population, and 70.3 percent indicated that FOIA had diminished their ability to develop quality informants. You can discount, and others may discount, that type of information, but these are the people who have to develop the informants, and these are the people who are encountering difficulties.

Senator HATCH. What percentage?

Mr. WEBSTER. A year ago, in a random population sample of 4,100 street agents, which is not our total population, 70.3 percent indicated that FOIA was giving them major problems.

Senator HATCH. Is that because of perception that they might be disclosed?

Mr. WEBSTER. I do not think we have any way of quantifying that. It is a combination of both. It is what the prospective informants, existing informants, or former informants tell them about their reasons for not cooperating.

It also represents some knowledge on the part of our agents about limitations of the assurances they can give. As I said before, they do not intend to lie to the informants. Informants want to know straight out, "Can you keep this?" By the time the agent has finished giving the qualifiers, it is not quite as reassuring as it ought to be.

Senator DECONCINI. Do you have other cases?

Mr. WEBSTER. I think one of the other concerns I should mention, since I have the opportunity, is in terms of trying to quantify. There are many cases where we are just not going to hear from somebody saying, "You sent us too much information." There are only a few who are going to stand up and say, "Ha ha, we found out with what you sent us."

In hostile intelligence activity in this country, which it is our duty to combat under our foreign counterintelligence responsibilities, it is a cardinal principle of positive intelligence gathering—which is what they are engaged in—that once you identify your in-

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formant you leave him in place. Once you know who the assets are, you just leave them there, because you know they are on the other side. So for many of them, there have been no particular reprisals and no particular injury, but they have lost their utility and perhaps are feeding back disinformation to us because they may have been identified and left in place. That is still another way in which this kind of information affects our ongoing responsibilities.

Senator HATCH. I am sorry I interrupted you, Senator.

Senator DECONCINI. That is quite all right. Would you like to go ahead?

Senator HATCH. I would like to ask one or two other questions.

Senator DECONCINI. I have a couple also.

Senator HATCH. I understand the FBI spends more than $10 million every year processing their FOIA requests. This results, of course, in a great volume of disclosures. For instance, you mentioned that over 60,000 pages were produced just for people in the Weather Underground organization. With this volume of material being processed—and you have to meet process needs on a daily basis—you have expressed to me personally that you have a great concern with human error.

While I am confident that you do everything possible to avoid errors that disclose sensitive matters, even bureaucracies are human. Would this chance for human error justify the administration's request that all terrorism, foreign counterintelligence, and organized crime records be exempt?

Mr. WEBSTER. It is certainly one of the important reasons for doing so. It goes beyond mere protection of informant information; it involves the protection of our sources and our methods, the means by which these long-term, ongoing investigations can be protected.

I mentioned earlier that we collect a great deal of data. It is a slow process putting things together, finding our way, and making sense out of bits and pieces of information. If any of that gets out, not just source information, but if any of that gets out—criminal enterprises can take great advantage of that by sending us down blind alleys, escaping us as we get closer to them, knowing how we operate.

All of those reasons, I think, in addition to protecting the lives of sources of information go to giving us special protection in these highly sensitive, crucial areas.

Senator HATCH. I take it that these little illustrations you have given us have just been a random sample of many, many more.

Mr. WEBSTER. That is correct.

Senator HATCH. Can you give us any estimate of how many more there are that you know about? There are many you do not know about, I am sure.

Mr. WEBSTER. I really cannot, Mr. Chairman.

Senator HATCH. Is it thousands or tens of thousands?

Mr. WEBSTER. All that we have on file are those that we started collecting so that we could talk to Congress about it about 2½ years ago. I suppose we will never know all those who simply stopped doing business with us—whether that was or was not an issue. Those that have told us about it, and have attributed their problem to this act, we have documented.

Senator HATCH. Do you agree with local law enforcement officers who have testified that informant testimony has really been drying up as a result of these acts? Some have said that they may only have access to as much as 25 percent of the informant testimony they used to have, which used to solve almost all of the crimes. Is your experience the same?

Mr. WEBSTER. Our experience is, and remains, that the informant is the single most important tool in law enforcement, bar none.

While I have conducted within the Bureau a concerted effort to pull back our informant base, we have run studies and evaluations of our informant system and brought in outside help like Professor Wilson at Harvard to see how effective we are with what we have. While we are holding our own and maybe making the beginnings of some improvement, it is nowhere near where it ought to be, and it is nowhere near where it could be if we had the proper kind of protection to give them.

There is another concern that fits, I think, into the question that you are asking me, and that is the danger of a law enforcement agency going the other route in trying to protect its sources by going to the hip pocket informant. We have seen that happen in State and local law enforcement. It has not happened in the FBI. It must not happen in the FBI.

That is where the person feels such a heavy responsibility for the safety of his informant that he will not reduce to paper the kinds of data that make our informant program a credible one, where we can account for money paid to an informant, where we can account for his conduct, where we can account for the instructions that have been given to him about engaging in illegal activity and so on. That is very important to a good informant program, and it is an unacceptable alternative to me to the risk what we are currently accepting under FOIA in its present form.

We must not go that route. I do not believe we will, but that is the risk that we are going to experience, and it is the risk that other law enforcement agencies are in effect practicing with us when they will not give us on paper the kind of information that we need.

Senator HATCH. In your opinion, how has FOIA affected your relationships with State and local law enforcement agencies?

Mr. WEBSTER. It has contributed to a considerable strain, not only in terms of the information they will not give us but their concern that we are not able to develop the kind of information that helps them solve bank robberies and other things that impact on their communities.

Senator HATCH. Is the current 10-day time limit rush for processing leading to more human error? Can you give us some specific instances of the impracticality of the current time limit?

Mr. WEBSTER. I gave you the one problem in the *Rosenberg* case.

We are simply falling behind, and that is regrettable. We are not able to respond in 10 days, as the statute requires. I reported that problem to Congressman Richardson Preyer's committee when I felt it was no longer proper just to ignore the provisions of the statute.

Budget restrictions limit us to what I think is a pretty large bundle of assets as it is—about 300 employees under 30 lawyer

agents working full time, plus all those in the field. One answer is to pour on more men. I know we are not going to get more men for FOIA. It would have to come out of some other important investigative responsibility that we have.

All of the provisions of the administration bill and your bill attempt to address the problem of time on a rational basis. The press, which only accounts for 2.7 percent of all of our requests, currently stands in line with all the others. It is my understanding that these proposals would provide an avenue for expediting responses to the press. I think the same thing would be true on other short requests.

The President's bill proposes that if you can find the records in one 8-hour day, you have, in effect, 30 days to get it out and review it. The average request, putting them all together, requires us to look at about 182 documents—that is on average—to respond to a single individual request. Some, of course, take thousands and thousands, and some do not, but that is the average—182.

Anything that would give us a rational basis for responding within the framework of the law would be welcome. I am not comfortable with a statutory requirement with which we lack the ability and the resources to comply.

Senator HATCH. I have other questions, but I want to turn to Senator DeConcini. Therefore, I will ask just one more for now. I have been here 5 years and gone through Griffin Bell, Benjamin Civiletti, and now William French Smith. You have served that time as FBI Director. All have indicated that serious crime, especially terrorism and intelligence problems as well as organized crime, are increasing by leaps and bounds and that it is becoming almost epidemic in nature. Do you agree with that?

Mr. WEBSTER. Yes, I have to agree with that, because all the crime statistics show extensive increases in terms of 9 percent, 10 percent, and 11 percent annual increases over the previous year in violent crime. That is fundamentally what we are talking about; organized crime is violent.

Senator HATCH. What about terrorism?

Mr. WEBSTER. Terrorism is about as violent as you can be.

Senator HATCH. Do you see that invading America like it has Europe?

Mr. WEBSTER. No. That is another subject. The number of terrorist incidents has declined, but before we take too much comfort in our efforts in that direction, we have to look at the increase in violence of the remaining terrorist activities plus an ongoing concern about international terrorism and the risk that we may see some of that.

We have our classic groups that we have dealt with in the past—Croatians, the FALN, and anti-Castro Cubans or the Omega-7 group—but now we see very disturbing activities by Libyans, concerns that we have had over some period of time. With the large number of Iranians in the country, we may have trouble there because of international events. The Philippine terrorists are expressing themselves in this country; the Armenian terrorists are reprising against the Turks. We have a whole range of these that we did not previously experience. We must realize that if we are going to

stay on top of this we have to have sources of information who are reliable and who are not afraid to give us information.

We are constantly being asked, "What are you doing to keep it from happening before it happens?" It is only by having this kind of information in place and access to this information.

We had the Brinks robbery. We were dealing with old radicals engaging in violent crime, but we were able to put together very substantial information in a very short period of time identifying safe houses and other places. Arrests took place in sequence with tremendous local cooperation.

In other cases, when we have strained international relations at various times involving particular countries, we have to be able to move promptly into those areas and task our sources of information to see what is happening. We have to know what kind of a Libyan threat we are talking about, what kind of reprisals in this country we are apt to find ourselves confronted with, and where.

In all these areas we are talking about people whose lives are on the line giving us this kind of information, and they have to be there. We have to have confidence in them, and they have to have confidence in us.

Senator HATCH. I want to thank my colleague for allowing me to interject there.

Senator DECONCINI. Thank you, Mr. Chairman.

I think we could spend a great deal of time discussing this issue. I would like to ask a question of Judge Webster.

Judge, in the process of intelligence gathering and law enforcement the Bureau works with foreign governments. Can you give us only background on experience that you have with foreign governments as to how they perceive this Freedom of Information Act with regard to our protecting confidential information that they have given to us? Can you give us an insight on that side of it?

Mr. WEBSTER. It is a problem, Senator. It is one in which many of our friends are going along on faith, but the number of inquiries that they make at all levels of the Bureau and to me personally indicates a real unease about sensitive information and whether or not it can be given to us. We do not want information that is so watered down that we may misunderstand it or act mistakenly about it. We want to have as much accurate information as we can. Those countries uniformly view the Freedom of Information Act as a hazard in our relationships.

We have been fortunate in that we do maintain good, strong relationships with the free countries of the world, and that information has proved at times vital to the national security of this country, information that they are willing to share with us. At the same time, we have honored and protected that type of information. It is very important to them that their sources be fully protected.

There have been cases where we have declined prosecution in order to protect a source that was so sensitive that the foreign government would not consent to it being disclosed, and that was necessary to a successful prosecution. At the same time, we eradicated the problem, which was the most important thing. They have seen that. They know our sincerity and our effort, but they are like any-

body else who can look at the act, see how it is being administered, and realize there is some hazard.

Senator DECONCINI. Have there been any examples, without giving any specifics, that you have come across of intelligence information given to us by a foreign law enforcement agency or government that was compromised?

Mr. WEBSTER. I would rather not talk too much about that, but the processing of the information——

Senator DECONCINI. Is that a real possibility?

Mr. WEBSTER. Yes. It is a human error possibility. We have the exemption to protect foreign countries and always have, but the human error possibility is there.

Senator DECONCINI. Mr. Director, the administration's bill would amend the judicial review provision of the act as it applies to information exempt under section (b)(1) for national defense and foreign policy reasons. Judicial review would be changed from de novo review to review determining whether an agency denial was arbitrary or capricious.

You cite the de novo review as an assurance that the FBI has followed the exemption criteria in cases, say, involving organized crime?

Mr. WEBSTER. Yes, sir.

Senator DECONCINI. You do. Would not de novo review be an assurance of proper denial in foreign policy cases also?

Mr. WEBSTER. It would be some assurance. I think the additional requirement of a heavier standard, as applied to classified information as distinguished from the other exemptions, is in order and advisable. I do not put it at the top of my "must" list, but I think it is an important contribution.

I cited earlier in my testimony this afternoon two examples of two separate judges who erred in connection with classified information. One published it in his opinion. The other one ordered it disclosed but fortunately was persuaded to reverse himself at the time.

I really think the court should review classification. I know several high courts have said repeatedly that they should give some deference to what is required and that they should not be second-guessing de novo on the classifications.

Senator DECONCINI. A question has been raised in discussions I have had with people with a genuine conviction that the exemptions might be abused. Will we return to the days of law enforcement agencies using the exemptions for political purposes.

How do you respond to that question when you are asked on the podium, at a press conference, or even among your own agents? What is going to prevent abuses if we make alterations here?

Mr. WEBSTER. I am not sure that the present provisions of the act give any certain assurance that that could be prevented if you have people with the will and intention to subvert our democratic processes.

I can point to many of the things that are in place today that were not in place 10 years ago. Congressional oversight is perhaps the most important one of all and the fact that the committees of the Congress are exercising that oversight. We hope that we are responding to the satisfaction of the committees. This provides a sur-

rogate in those areas where it would be harmful to make matters public.

We can discuss with the chairman, with interested Senators, and with staff with clearance those sensitive issues.

Starting at the bottom, the whole system and the whole thrust have changed. My Office of Professional Responsibility is directed to receive from Mr. Finzel, the assistant director in charge of records management, any instance of illegality uncovered in the course of a Freedom of Information Act request. It is not just buried or exemptions placed on it; they are required to look into it.

The reports go to the Department of Justice. The Department's policy is clear. It may not be used for that. Executive Order 12065 prohibits the use of classification as a means for disguising illegal activity. We have all these built-in checks which can be oversighted by the Attorney General and by the oversight committees of the Congress to make sure that we stay on that road.

Senator DECONCINI. And there is nothing in this legislation that would alter that?

Mr. WEBSTER. Nothing at all.

Senator DECONCINI. Mr. Chairman, that is all the questions I have right now. I would like to suggest to the chairman that he consider scheduling a closed session with an invitation to the full committee to review with the Director some specific examples that would be more demonstrative as to the problem that law enforcement agencies face in this area.

I thank the Director for the examples that he has given, but I think in a closed session we would have the opportunity to have a better understanding of the problems that we face.

I thank you, Mr. Director, for your statement and your willingness to address this issue in, what I consider, a most professional way, without asking for wholesale alterations of the law, but instead trying to carve out an area that would permit law enforcement agencies to have a better opportunity to do something about the ever-mounting crime rate. Thank you.

Senator HATCH. Thank you, Senator DeConcini.

Thank you, Mr. Director.

We will consider Senator DeConcini's request. I think this is a very important, very volatile subject.

We have had a number of top journalists representing all of the great journalistic societies in this country before the subcommittee and of course they respectfully disagree, as I think it is easy to imagine journalists would. Their desire is to have total access to information, and thank goodness they do in many respects.

In any event, we appreciate your making the effort to be here today, and we appreciate having your testimony. Thank you so much.

Mr. WEBSTER. Thank you, Mr. Chairman. It is a pleasure to be here.

Senator HATCH. Our next witnesses are Mr. Allan Robert Adler and Mr. Morton H. Halperin, representing the American Civil Liberties Union, and Mr. Cornish F. Hitchcock, representing the Freedom of Information Clearinghouse.

Gentlemen, we will be happy to hear from you at this point.

STATEMENT OF MORTON H. HALPERIN, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY ALLAN ROBERT ADLER, AMERICAN CIVIL LIBERTIES UNION; AND CORNISH F. HITCHCOCK, FREEDOM OF INFORMATION CLEARINGHOUSE

Mr. HALPERIN. Mr. Chairman, I would like to say on behalf of the ACLU that we appreciate your willingness to hold this additional day of hearings, and we appreciate the opportunity to work with your staff in trying to narrow the differences that we have on this issue. We hope those discussions can continue.

We do not realistically expect that we will eliminate all the differences, but we hope that we can at least sharpen the disagreements, eliminate as much of the difference as we can, so that as the bill moves forward there can be a full debate on the key issues.

Mr. Adler, the person at the ACLU handling this issue, will summarize our statement.

Senator HATCH. Mr. Adler?

Mr. ADLER. Thank you, Senator Hatch.

On behalf of the ACLU and the Freedom of Information Clearinghouse, we want to thank you for the opportunity to appear before you today to jointly present our views on S. 1730 and S. 1751.

For the record, we too were eager to respond publicly to Assistant Attorney General Jonathan Rose's statement that the act is highly overrated. For brevity's sake, we will now simply associate ourselves with Jean Otto's eloquent rebuttal and state our firm belief that her remarks are amply supported in the public record that has been established in numerous congressional hearings over the years, including the hearings held in this subcommittee in July, September, and October.

It cannot now seriously be doubted that the Freedom of Information Act has been spectacularly successful in curbing the routine secrecy that had traditionally surrounded the operational records of the Federal Government.

This does not mean, of course, that the act in its present form is perfect. For example, our experience has shown that submitters of confidential commercial information to Government agencies should be accorded certain procedural rights when such information becomes the subject of a Freedom of Information Act request.

It may also indeed be better policy to permit agencies to recover the full cost of processing FOIA requests, rather than just search and duplicate costs when such requests are primarily for commercial purpose. This, in combination with a mandatory public interest fee waiver, would balance the allocation of costs more consistently with the ways in which they are actually placed upon the Government.

At the same time, we agree that current time limit provisions in the act do not function in a manner that fully satisfies either requesters or agencies, and they might be amended to clarify circumstances which justify agency delay, as well as circumstances which justify expedited access for requesters.

Additionally, a clear and concise definition of "record," presently lacking in the act, would be a useful amendment that would clarify

numerous problems from the perspective of both requesters and agencies.

Amendments to address these matters and all other proposed amendments should be narrowly tailored, however, to achieve specific aims without inhibiting the effectiveness of the act.

In considering proposed amendments, Congress should be guided by the following principles: No blanket exemptions should be provided for any agency. No blanket exemptions should be provided for agency files; only records or portions of records may be exempt. Records should not be exempted on a categorical per se basis. Some objective standard denoting "harm from disclosure" must be provided to justify denial of access to particular kinds of records and to facilitate de novo judicial review of such determination.

De novo judicial review should be maintained for all aspects of requesters' rights under the act. Denial of access to records should be based only upon one or more of the specific substantive exemptions; it should not be based on any agency inquiry into the purpose of the request or the nature of the requester.

Despite our disagreements with some of your proposals, Mr. Chairman, we must say that we appreciate your efforts to construct a bill that reflects an understanding of these principles. We are sorry that we cannot say the same for the efforts of the administration.

We recognize that anyone who takes on the task of drafting amendments to the Freedom of Information Act quickly finds himself climbing out on a very thin limb, and we realize that possibly, from your point of view, we may seem to be the first to arrive in such situations with a rather sharp saw.

Nevertheless, today, Mr. Chairman, we are going to join you out on that limb, because in our testimony we have proposed specific language for amendments to address many of the concerns raised in your bill and the administration's bill.

In consideration of the time constraints on this hearing now, we would ask how you would like to proceed. We could address those specific amendments or some of the comments that have been made by previous witnesses.

Senator HATCH. I would like you to work with us on those amendments rather than address them here.

I have to admit with regard to our relationship that I have been pleasantly surprised at how hard you folks have really worked to try and resolve this issue with us. Sometimes some of our colleagues feel that there is a knee-jerk reaction on some of these issues, and I think both of you have exhibited a very careful and analytical approach to this and a desire to do what is best under the circumstances, even though you do argue intensely and, I think, very effectively for civil liberties in this country.

I think sometimes we prejudge people far too much in this Godforsaken town, to be honest with you.

I particularly appreciated your testimony, and I appreciated it last time.

Would you mind if I just ask a question?

Mr. ADLER. No. Certainly.

Senator HA[illegible].. A number of courts have said that they will give special deference to the agency which classified a document when

reviewing to see if that record was "in fact, properly classified." Is not the provision in the administration's bill that puts this deference into the statute just the codification of current court practice?

Mr. HALPERIN. Senator, I think it is true that the courts have shown great deference—we would on occasion say too much deference—to the administration on classification. The problem is that if Congress now changes to this new standard of "arbitrary and capricious," we think it will have two effects.

One, it will deter judges in cases, where they should conduct a search and de novo review, from actually conducting that review. There are some cases where judges have done that, and what has happened typically—we have been involved in some of these cases—is that the judges turn to the Government lawyers and say, "I have looked at these documents in camera. Would you go back and take another look at them and press your people a little harder, because I do not think the material is properly classified?" In many of those cases, that has resulted in the release of information which the Government had originally classified.

Second, we think that what often happens—and we see this when we go from an original request to an administrative appeal and then the filing of a lawsuit—is that the Government lawyers then start to deal with the people who want to keep their information classified. This interaction, we feel, is helped by the Government lawyers being able to say, "We have to be able to justify to a judge why this information has to be kept secret, and to provide enough information to persuade the judge that it should be kept secret." We think that has a very healthy effect inside the Government.

The fact remains that under the current standard there are only two or three cases where anything that the Government has said is classified has been released or ordered released. We think release in those cases was amply justified.

The one case involving the CIA is now on appeal to the Supreme Court and the order to a release has been stayed indefinitely so the CIA has still not been forced to actually release a single sentence of information which it claimed was properly classified. We think courts will continue to give appropriate deference to the affidavits of agency officials. We think the system is working and that there is no reason to change the standards.

Senator HATCH. In your written statement, we do have your suggestions on the proposed amendment.

Mr. ADLER. That is true. I would just add, Senator Hatch, that in the case that was mentioned by Judge Webster—where the judge did in fact include in his opinion some of the information from the material that had been in the in camera submission—if you examine the published opinion, you may get some flavor for the overclassification that is still pervasive in our Government.

Senator HATCH. Excuse me. We are going to have a vote. I would like to submit further written questions to you and continue to work with you to see if we can resolve this problem. This has been a horrendous problem for me and for the whole committee.

We would like to come up with something that we can have some semblance of accord on. It is clear to me that there have to be some changes and this act does need to be tightened up in spite of some

of our journalists thinking that it is a very well written act. There are well written parts of it, but there are some parts that have not worked judiciously.

We appreciate your efforts, and we are sorry this is taking so long today.

Yes, Mr. Hitchcock?

Mr. HITCHCOCK. Thank you, Senator.

I would just like to associate our own organization with the comments made by Mr. Halperin and Mr. Adler. As a technical matter, we would like to submit an additional comment on one of the issues that came up during the last hearing for inclusion in the record, if we may.

Senator HATCH. That will be fine. That will all be made part of our record.

Mr. HITCHCOCK. We, too, will be happy to take any prepared questions that the subcommittee may have.

Senator HATCH. We will submit those. Thank you so much. We appreciate your efforts here today.

[The joint prepared statement of Mr. Adler, Mr. Halpern, and Mr. Hitchcock, with a response to Mr. Alder from Mr. O'Reilly follow:]

PREPARED JOINT STATEMENT OF ALLAN ROBERT ADLER, MORTON H. HALPERIN, AND CORNISH F. HITCHCOCK

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union and the Freedom of Information Clearinghouse, we want to thank you for the opportunity to appear before you today to jointly present our views S.1730 and S.1751, amendments to the Freedom of Information Act proposed, respectively, by Sen. Hatch and the Administration.

Last month, when Assistant Attorney General Jonathan Rose appeared before this Subcommittee to unveil the Reagan Administration's package of proposed amendments to the Freedom of Information Act, he characterized the Act as "highly overrated". We strongly disagree with this contention, and we believe the public record that has been established over the years in numerous Congressional hearings clearly refutes it.

It cannot now be doubted that the Freedom of Information Act has been spectacularly successful in curbing the routine secrecy that had traditionally surrounded the operational records of the federal government. The benefits of that have accrued directly from disclosures achieved through the Act have been documented in virtually every area of interaction between the government and the governed. Although some supporters of the Act tend to view its success largely through reference to specific instances in which the public disclosure of government records has led to positive action to address improper activities or unsatisfactory performance by government agencies and employees, it is generally agreed that the Act's most profound contribution to good government may be in its indirect success in encouraging routine voluntary disclosure of government records by agency employees. In addition, there is a substantial consensus that awareness of potential public scrutiny of records through use of the Freedom of

Information Act has sharpened record management and classification practices in the federal agencies.

Overall, the FOIA has proven to be an effective tool for enhancing public accountability of government through public access to agency records. This does not mean, of course, that the Act, in its present form, is perfect. It may be useful to consider some amendments which would better accomodate legitimate confidentiality interests and smooth some of the difficulties in agency implementation of the Act, as well as some which would make the Act even more effective in providing public access to agency records.

For example, experience has shown that submitters of confidential commercial information to government agencies should be accorded certain procedural rights when such information becomes the subject of a FOIA request. It may also be better policy to permit agencies to recover the full costs of processing FOIA requests, rather than just search and duplication costs, when such requests are primarily for a commercial purpose. At the same time, the current time limit provisions, which do not function in a manner that fully satisfies either requesters or agencies, might be amended to clarify circumstances which justify agency delay as well as to provide requesters expedited access in cases of compelling need. A clear and concise definition of "record", presently lacking in the Act, would also be a useful amendment that would clarify numerous problems from the perspectives of both requesters and agencies.

Amendments to address these matters, and all other proposed amendments, should be narrowly tailored to achieve specific aims without inhibiting the effectiveness of the Act. In considering proposed amendments, Congress should be guided by the following principles:

* No blanket exemption should be provided for any agency.

* No blanket exemption should be provided for agency files; only records or portions thereof may be exempt.

* Records should not be exempted on a categorical per se basis; some objective standard demonstrating harm from disclosure must be provided to justify denial of access to perticular kinds of records and to facilitate judicial review of such determinations.

* De novo judicial review should be maintained for all aspects of requesters' rights under the Act.

* Denial of access to records should be based only upon one or more of the substantive exemptions; it should not be based upon any agency inquiry into the purpose of the request or the nature of the requester.

We would now direct the attention of this Subcommittee to our comments and recommendations regarding the provisions of S.1730 and S.1751. In some instances, we completely endorse or oppose a particular proposal; in others, we recommend modifications to a proposal or propose alternative language to achieve similar purposes. In several instances, we propose amendments to address aspects of FOIA that are not addressed in either bill. Our analysis, however, is consistently based upon our primary concern to promote, rather than restrict, the effectiveness of the Act in providing public access to Agency records without creating unnecessary additional costs or burdens for requesters or agencies, and without needlessly changing the Act in ways that will result in a new generation of extensive litigation and judicial interpretation.

FEES

Currently, agencies must promulgate their own fee schedules, which can provide for the recovery of only the "direct costs" of search and duplication. Documents must be furnished to the requester at no charge or at a reduced charge if the agency determines such action "is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

S.1730 would authorize OMB to promulgate uniform fee schedules for all agencies, with specific variances where appropriate. No fees would be charged for requests requiring no more than 2 hours of processing and resulting in a release of no more than 20 pages of records. For other requests, agencies could assess "reasonable standard charges for the cost of search, duplication and other processing of such request, and for other costs incurred in processing the request" [i.e., costs for reviewing responsive documents to determine if any material is exempt, and unspecified "other costs incurred"]. In addition to these charges, requesters for records containing "commercially valuable technological information, which was generated or acquired by the government at substantial cost to the public," could be charged a fair value fee or royalties, or both. Fees would be waived or reduced only if such action meets a "substantial" public interest, as determined under the present standard by the consideration of several enumerated factors. In case of any disputes between requesters and agencies concerning fees and fee waivers, OMB would be permitted to arrange a "speedy, informal, equitable, and imparital resolution." Agencies would be permitted to keep one-half of all collected FOIA fees, with the balance going to the general fund of the Treasury.

S.1751 does not propose uniform fee schedules for all agneices. However, like S.1730, it would authorize agencies to charge for review costs under a expansive authorization to charge for any costs "reasonably attributable to responding to the request." It contains language identical to S.1730 with respect to "commercially valuable technological information" generated or acquired by the government, and would change the current standard for fee waiver or reduction by expressly stating that the agency makes such determinations "in the exercise of its discretion."

COMMENTS AND RECOMMENDATIONS

OMB Fee Schedules - Promulgation of uniform fee schedules by OMB for application to all agencies appears to be a reasonable way to eliminate inconsistencies in fee assessments which may emerge from different schedules developed by individual agencies. As proposed in S.1730, it might be useful to have OMB promulgate fee regulations which all agencies must follow unless they can demonstrate a need for special variance.

Review Costs - The fee proposals in both S.1730 and S.1751 are couched in such broad language that they would appear to permit agencies to charge requesters for virtually any costs that can be ascribed to "processing" or "responding to" FOIA requests. Their primary stated purpose, however, is to allow agencies to recover review costs, as well as search and duplication costs, in response to complaints that agencies are not compensated for what is generally claimed to be the most burdensome administrative task in processing FOIA requests -- reviewing responsive records to determine which material should be released to the requester and which material should be withheld pursuant to one or more of the Act's exemptions.

In the commentaries that accompanied the introduction of both bills, the proposed recovery of review costs is justified by the assertion that the bulk of FOIA processing costs now borne by the Government derive from requests that benefit corporate or private commercial interests rather than any interest of the general public which Congress primarily intended the FOIA to serve. While we sympathize with the Government's concern in this area, we note that the fee proposals in both bills would not limit the assessment of review costs to the bothersome commericial requesters, but would authorize such additional charges against all requesters, including those who seek records for non-

commercial and public interest purposes. We object to the assessment of review costs against these latter requesters because, as the drafters of S.1730 and S.1751 acknowledge, they do not substantially contribute to the cost-burden which these proposals seek to alleviate. Moreover, the absence of reasonable criteria for assessing legitimate costs of review -- a product of Congress' failure to examine an administrative process that is rife with documented bureaucratic inefficiency -- leads us to believe that the assessment charges for review time, left wholly in the discretion of the agencies, would inevitably be made in a manner contrary to Congress' intent that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." S.REP. No. 93-1200, 1st Sess. 8 (1974).

To avoid this problem while still addressing the Government's concern about commercial requesters, we propose the following alternative to the fee proposals in S.1730 and S.1751:

> Section 552(a)(4)(A)(i)(as redesignated)[now section 522(a)(4)(A)] is further amended by striking the second and third sentences and inserting in lieu thereof:
>
> "The schedule shall provide for the payment of a reasonable charge for document search, review and duplication, provided, however, that a reasonable charge for document review can be assessed only during the initial processing of a request and not during any administrative appeal. When the records are not to be principally used for commercial purposes, the charges shall be limited to the direct costs of search and duplication. Records shall be furnished without charge or at a reduced fee when the information is sought primarily for the benefit of the general public."

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The amendment would establish three categories of requests: (1) records to be used principally for a commercial purpose; (2) records not to be used principally for a commercial purpose, e.g., records of interest to a particular individual; and (3) records sought primarily for the benefit of the general public. In each instance, the requester could be assessed a reasonable charge for search, review and duplication under the first category unless the requester could explain to the agency why fees should be assessed under one of the other categories. Thus, if the bulk of many agencies' FOIA requests are truly for corporate or private commercial interests, this proposal would permit the agencies to recover the costs of processing such requests. At the same time, it would allow non-commerical requesters to continue to be charged only search and duplication costs, as they are under current law. (The fee waiver for the third category is discussed below.)

Our proposal, unlike the review costs proposals in S.1730 and S.1751, would permit agencies to recover full processing costs, where appropriate, without extending an open invitation for them to factor in whatever other administrative costs they can recoup under the guise of "processing" or "responding to" a FOIA request. Thus, we would limit the assessment of reasonable review costs, where appropriate, only to the initial processing of a request, so that requesters could not be assessed for review at subsequent levels of authority during administrative appeal.

Fair Value Fees/Royalties - While we can sympathize with the Government's desire to prevent private parties from obtaining a financial windfall by exploiting innovations which have been achieved at government expense, we regard this proposal as unacceptable for several reasons. It creates a situation in which taxpayers, having already paid for the information to be "generated or acquired by the

government," would be charged again for requesting access to such information. It could also pit the government in unfair competition with certain elements of the private sector. In any event, as drafted in both bills, it would lead to administrative nightmares because of definitional problems and its unanticipated potential breadth. We believe legislation on this matter would be sufficiently complictaed and controversial without being considered in the FOIA context; it is more appropriately a subject for evaluation in the copyright and patent law context.

Fee Waiver/Reduction Standard - This is one area of FOIA practice in which the agencies are much more the abusers than the abused. In practice, agencies are well aware of their discretion in these matters and they seldom determine that a waiver of fees is "in the public interest." We therefore see no justification for either S.1730's proposal to raise the waiver standard to a "substantial" public interest, or S.1751's proposal to raise a red flag over the discretionary nature of agency determinations, signalling for only minimal judicial review.

On the contrary, we believe Congress should make clear to the agencies (and the courts) that a complete waiver of fees is mandatory in all cases where records are sought primarily for the benefit of the general public. This would be accomplished by the third category of our three-tiered fee policy proposal, which is intended to encompass requests by journalists, non-profit public interest organizations, and others who seek access to records primarily for the benefit of the general public. Agencies that would be permitted to exact charges for the full costs of processing commercial requests, and for search and duplication costs in non-commercial situations, should be more conscientious about waiver requirements for public interest requesters.

Fee Disputes - We take no position on S.1730's proposal to make OMB an informal mediator in fee disputes. If the proposal is

adopted, however, we suggest that it be clarified to indicate that no activity or proceeding which is conducted by OMB in seeking resolution of a fee problem would alter or interfere with the requester's right to litigate the matter in court.

Disposition of Collected Fees - While we can appreciate the effort to give agencies an incentive to process FOIA requests through collection of fees, there are several practical problems with this plan: If an agency could keep X dollars in collected FOIA fees, would not OMB reduce the agency's budget by X dollars in the following year's authorization, leaving the agency no better off financially than they are now? Would not this approach actually provide the agency with an incentive to not waive fees, as well as to "run the meter" on commercial requesters? Would not this proposal also violate constitutional proscriptions against spending money that has not been duly appropriated by Congress? See U.S. CONST. art.1, sec.9, cl.6.

In our view, the proposal to divide collected fees between the Treasury and the collecting agency would create more problems than it would resolve.

TIME LIMITS

Currently, agencies must respond to initial requests within 10 working days and to appeals within 20 working days of receipt. They may obtain an extension of no more than 10 working days upon written notice to the requester of the existence of "unusual circumstances" as described in the Act.

S.1730 would retain the 10-day and 20-day requirements, but would expand the meaning of "unusual circumstances" and would permit an extension of 30 days rather than the current 10 days.

S.1751 would impose 30-day requirements for agency response to initial requests and to appeals in all cases requiring more than 8 working hours of search and review time, and in all cases involving commercial information.

Expedited access would be eliminated for all non-public interest requests, regardless of the personal need asserted. In addition, a 90-day statute of limitation would be imposed for the filing of FOIA lawsuits -- no statute of limitation currently exists for FOIA.

Comments and Recommendations

Initial Response and Appeal - Rather than attempting to devise specific new time limits as in S.1751, we would endorse S.1730's approach of supplementing the Act's present 10 and 20-day figures with better-defined "unusual circumstances" justifying agency delay. Among its other advantages, this approach would permit the time-frame for any new business information - submitters procedures to be included within the general FOIA time limitations as an "unusual circumstance" requiring some specified additional time. We have no serious objection to S.1730's proposal to permit time limit extentions of 30 days rather than the current 10 day in unusual circumstances.

Although it is difficult to get agencies to respond promptly within current deadlines, we are concerned that any broad expansion of the deadline will simply result in the expansion of agency processing within the new permissible limits. The relatively short current deadlines give agencies an incentive to process requests as quickly as possible, and, as a practical matter, courts have been lenient where agencies operating on a first-come first-serve processing basis have developed substantial backlogs, See, e.g., Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C.Cir, 1976). Many agencies can fulfill their FOIA obligations under the current time limits and it would not be good policy to give all agencies across the board carte blanche to invoke an open-ended extension.

Expedited Access - We cannot accept the proposal in S.1751 that would permit expedited access to be granted on a discretionary basis only to requesters who can demonstrate both a compelling need and a public interest in the request.

Agencies often process requests on a first-come, first-served basis and a significant backlog can frustrate a requester with a compelling need for prompt disclosure. There may also be cases where a party has a need for disclosure of agency records before the current time limits have expired, e.g., a newsperson working on deadline or an organization that needs access to agency records in order to file comments on a proposed antitrust settlement which will otherwise be approved before the FOIA request can be processed. We offer the following amendment to deal with such cases:

(a) Section 552(a)(1) of title 5, United States Code, is amended by striking "and" at the end of subparagraph (D), inserting "and" in lieu of the period at the end of subparagraph (E) and adding at the end thereof the following:

"(F) rules stating the order in which the agency will process requests for access to records requested under this section, including procedures by which a requester who can demonstrate a compelling need for prompt access to such records may have such request considered before previously filed requests, provided that the agency is able to locate and review the records in less than ten working days."

(b) Each agency shall propose for public comment and adopt the rules required by this section within 180 days after enactment of the amendment's contained in this Act.

(c) Section 552(a)(6)(C) of title 5, United States

Code is further amended by adding at the end thereof the following new clause:

"(vi) A requester may be deemed to have exhausted his administrative remedies before the time limits specified in this subsection if the requester (I) has a compelling need for immediate access to the requested records and has notified the agency of the reason therefor in his request; and (II) has reasonable grounds for believing that the agency will not grant his request before the time limits specified in this paragraph have expired. Upon complaint, the district court shall have jurisdiction to order production of the requested records according to a timetable set by the court.

The amendment deals with the first problem by requiring agencies to adopt rules allowing a requester with a compelling need for prompt access to agency records to have his or her request considered promptly. The second problem is handled by allowing requesters to go to court before the time limits have expired if the requester can meet the heavy burden of showing a compelling need. While the court is authorized to speed up the agency's timetable for processing the request, the court is required to dismiss the case if the requester does not prove the need for going to court before the time limits are up.

Statute of Limitations - Although there is nothing inherently objectionable about S.1751's proposal for statute of limitations for filing FOIA suits, we cannot recall anyone raising the issue at any of this Subcommittee's hearings, nor are we aware of any particular problem which it might be intended to remedy. Nevertheless, if a statute of limitations is to be enacted, we strongly suggest that the 90-day requirement be dropped in favor of a one-year

requirement. The former figure is sufficiently short so as to raise concerns about the adequacy of the time permitted to a requester to determine whether to file suit and, if so, to obtain adequate legal counsel. It is also likely to encourage frustrated requesters to file suit early in order to preserve their rights to their day in court at a later date. In any event, the latter figure is a much more common figure for statutes of limitations on various civil actions.

Public Records and Duplicative Requests

Currently, the FOIA does not permit agencies to withhold non-exempt agency records merely on the grounds that they are in the public record or otherwise publicly-available. Thus, newsclips, magazine articles, and other such items must be given to requesters if they are found in agency files and are responsive to the requests. Nor does the Act prescribe any limitations or procedures on duplicative, successive or multiple requests to one or more agencies.

S.1730 would amend FOIA so that an agency would not be required to copy that portion of a record which is "a public record or otherwise available in public records... but may identify such portions by date and source." Newspaper clippings, magazine articles and court records are expressly included with this material. It would also seek to limit duplicative, successive or multiple requests by requiring requesters to state the number, date and recipient agencies with respect to requests they made during the previous two years, and by authorizing coordinated or consolidated agency responses for requests on "the same general subject." In addition, agencies would not be required to copy any portions of records previously furnished to the requester, but only to "update the response with any requested material which is available and was not previously furnished."

S.1751 would similarly amend the FOIA with respect to "items which are in the public record or otherwise publicly available, but the agency shall inform the requester of the nature of such public source materials." "Publications available from the Government Printing Office" are expressly included, along with the materials expressly cited in the counterpart proposal in S.1730. S.1751 does not address duplicative, successive or multiple requests as a general issue.

Comments and Recommendations

Public Records - We sympathize with the agencies' concerns here and would not object to the proposal in principle. However, we would urge Congress not to include court records in this category of records because they are usually available to the public at only one location - the court- which may be distant or otherwise burdensome for obtaining them. We doubt that these records appear in agency files with the same frequency as the other enumerated items and therefore believe that they do not unduly burden the agency that must provide them to a requester, particularly if the requester must pay reasonable fees. Moreover, the fact that there are court proceedings relating to the subject of a request is precisely the kind of information that Congress intended persons to be able to obtain through the Act.

In addition, we would also recommend that the agencies, if not required to copy "public records," should be required to at least inform the requester as to the public source of such records. This would not unduly burden the agency, since it would already have the information in hand, and it would at least partly effectuate the purpose of the FOIA by informing the requester of the existence of responsive records and where they may be obtained.

Duplicative Requests - We are, again, sympathetic to the concerns underlying these proposals, but we have a few problems with the formulation in S.1730. We do not object to coordinated responses by agencies that have received identical or substantially

similar requests, since this already occurs in practice. We are concerned, however, that consolidated responses might lead to the omission of certain records which would otherwise be provided if the agencies responded severally. It often happens, for example, that more than one agency will have responsive records that may address "the same general subject" but reflect distinctly different perspectives according to the distinctly different nature of the agencies. The Defense Department, the State Department and the Justice Department may all have responsive records concerning government actions in the context of the Iranian student demonstrations here in Washington during the hostage crisis. Nevertheless, the records of each agency will contain substantially different information on "the same general subject," whether they be related lawsuits or White House press conferences. The breadth and ambiguity in the phrase "same general subject" raises concerns about the nature of a consolidated, or even a coordinated, response.

Beyond this problem, we would suggest that there is a distinct difference between cooperative responses which now occur when agencies consult each other and learn of duplicative requests, and those which would result by placing the burden on the requester to "flag" such potential situations by listing all requests made within the previous two years. As we explain more fully in our section on "Access to Records", infra, requirements of this kind place an intimidating burden on requesters which may discourage requests and, at the same time, create an additional layer of burdensome administrative processing for the agency that seeks to enforce them. It is not clear that, in this case, there would be a resulting reduction in duplication of agency efforts which would be sufficient to justify the imposition of this requirement.

While we have no problem with the limitations to "updating" previous requests, we believe that Congress should reject any specific amendment concerning consolidated or coordinated agency responses that would be triggered by the nebulous guideline

of requests on "the same general subject" and which would place any affirmative burden on the requester to provide the agency with information about any request other than the one presently made and presently under consideration. There are no present restrictions which prevent the agencies from consulting with either the requester or other agencies directly on such matters and we believe such consultations and cooperation should remain discretionary.

REASONABLY SEGREGABLE

Currently agencies are required to make available "reasonably segregable" non-exempt portions of records, even if other portions are exempt from disclosure.

Section 6 of the Hatch bill amends the agency's responsibility to make available "reasonably segregable" portions by setting forth several factors for agencies to consider in determining what constitutes "reasonably segregable."

The proposal is unnecessary. No problem with respect to segregability has been demonstrated and courts and agencies have 15 years experience in applying the existing standard, which is working quite well. In addition, some of the criteria are substantive in nature and may restrict the flow of information by allowing agencies to say, in effect, "This record cannot be withheld under any exemption, but we are going to deny access to it anyway."

Philosophically, what is disturbing about this proposal is the fact that it gives agency personnel the discretion to inquire into why requesters seek particular records, even though (1) the exemptions have traditionally been used as the sole basis for determining whether to withhold records and (2) the FOIA has been interpreted to make records available, regardless of the purpose for which they are sought. The abridgment of these principles is demonstrated by examining some of the new standards which the amendment would allow agencies to use:

-- the "public interest in disclosure." The only question should be whether the reasonably segregable part of the record is exempt, not whether it should be withheld because the agency does not think release is in the public interest. Such a "public interest" consideration should be made only in connection with a fee waiver request.

-- the "intelligibility or other value to a requester." Once again, it is up to the requester to use the record as he or she sees fit, regardless of intelligibility. Agencies should not be put in the paternalistic role of saying, in effect, "this record is probably unintelligible or of little value to you, so we will not make it available."

-- the degree to which such portions are reasonably segregable from the record and "any significant costs" in making the segregable portions available. Again, this should be considered in the context of the revised fee waiver provisions we have proposed elsewhere.

-- whether the information is otherwise available to requesters. The fact that something may be otherwise available should not be a reason to deny a request. Also, the requester may live in an area where the requested records are not readily available, and if he or she is willing to make a request and pay whatever fees are necessary, why should the agency be able to say "no" on the ground that the requested record is not "reasonably segregable"? Moreover, it is hard to imagine how this factor could come up in the context of deleting exempt material from non-exempt material.

-- in Exemption 1 and 7 cases, the "degree of risk that there may be persons who have such significant information or expertise . . . as to render deletions of only matter that the agency can prove to be exempt ineffective to protect exempt information which may be derived from such records." This would create a new "jigsaw puzzle" exemption under which an agency could concede that certain segregable

material is not exempt but should nonetheless be withheld because some unspecified person could use the non-exempt portion as a piece of some intelligence jigsaw puzzle and learn what the exempt portions say. This exemption has considerable potential for shielding records from public view and puts the requester in the difficult position of proving a negative, i.e., that there is no one "out there" who is capable of fitting the information into a larger jigsaw puzzle. To the extent that this problem arises, as a practical matter, it should be handled through existing procedures under Exemptions 1 and 7.

MANUALS AND INSTRUCTIONS

Currently, access to certain manuals, instructions, guidelines and the like in law enforcement agencies has been the subject of extensive case-by-case litigation examining the extent to which such materials may be protected from disclosure under Exemption 2 or Exemption 7. Authority has been split over the coverage of these exemptions, with divergent court opinions focussing upon the public interest in the materials, the risk of facilitating circumvention of law through their disclosure, and the fact that they are generally not "investigatory" records.

S.1730 would amend Exemption 2 to exempt a broad range of manuals, instructions, guidelines and examination material "the disclosure of which would jeopardize law enforcement, negotiations, protection of government officials, or examinations." It would also provide a per se exemption for reports describing the vulnerability to criminal interference of government facilities or activities or of persons engaged in interstate or foreign commerce.

S.1751 would amend Exemption 2 to provide a per se exemption for virtually the same materials that S.1730 would exempt under a "jeopardy" standard.

Comments and Recommendations

As we understand them, the primary concern underlying the proposed amendments to Exemption 2 in both bills is to provide protection for certain law enforcement manuals. Both bills, however, would go further to protect a broad range of materials that are outside the context of law enforcement. Some of these would appear to be protected under existing exemptions, while others would not appear to be deserving of any exemption because of the public interest in exposing "secret law" and the lack of harm resulting from their disclosure.

In light of our doubts about the need for protecting some of the enumerated materials, we find the proposal in S.1751 to be particularly objectionable because of its breadth and its failure to set forth an objective requirement of some showing of harm which would result from their disclosure. Although S.1730 rejects the per se basis for exempting a similarly broad spectrum of materials, it proposes only a vague standard of "jeopardy" to the broadly-characterized interests which give rise to such materials.

We understand the Government's legitimate concern over the possibility that public disclosure of certain law enforcement materials could facilitate circumvention of the law. We are also aware of the confusion that has emerged in this area of FOIA law because of conflicting decisions by various federal Courts of Appeal. We believe, however, that both the Government's concerns and the integrity of the FOIA exemption scheme will be better served if the problem of law enforcement manuals and instructions is examined and resolved in the context of Exemption 7 rather than Exemption 2.

The only reason that such materials have not been accorded the protection that Exemption 7 can provide for other sensitive law enforcement records is that they do not qualify as "investigatory" records, a qualification which is

a threshhold requirement for considering application of this exemption. If, as is proposed in both bills, the "investigatory" qualification is deleted from Exemption 7, law enforcement manuals and instructions may obtain the same protection which is available to other records which are compiled for a law enforcement purpose, at least to the extent that production of these materials would result in one of the six enumerated harms which justify protection under the exemption. This approach would meet the Government's concern about its present inability to withhold such materials from a FOIA requester, and it would meet the public's concern about permitting official secrecy only under objectively reviewable standards setting forth particular harms which could result from disclosure.

As for the non-law enforcement manuals and instructions which both bills would protect under Exemption 2, we believe the sponsors have failed to demonstrate, for each of the enumerated materials, a convincing need for exemption. The ability to demonstrate such a need might be facilitated if the sponsors narrowed their proposals to focus on the specific kinds of materials they seek to protect, rather than attempting to justify protection for broadly-characterized categories under a vague, general argument. If such specific needs for protection can be shown, at least under some version of a "circumvention of law" standard for the requisite demonstration of harm from disclosure, then perhaps a narrow amendment to Exemption 2 would be in order.

EXEMPTION 4: BUSINESS RECORDS

Currently, agencies are allowed to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Section 8 of the Hatch bill and section 7(b) of the Administration bill would make identical changes in Exemption 4 to allow agencies to withhold:

> trade secrets and commercial, research, or financial information, or other commercially valuable information obtained from [a] any person and privileged or confidential where release may impair the legitimate private, competitive, financial, research or business interests of any person and where release may impair the government's ability to obtain such information in the future.

(additions underlined; deletion in brackets).

In reviewing claims under this Exemption, courts have followed an objective standard, i.e., is disclosure "likely . . . (1) to impair the government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

Our objections to the proposed amendment are that:

(1) there is no evidence that any substantive change to Exemption 4 is needed, as most of the stated problems are procedural, and courts are presently sensitive to disclosure of genuinely confidential business records;

(2) it is overbroad and would allow submitters to shield information even if disclosure would not adversely affect their competitive position and even if there is a public interest in disclosure; and

(3) it would apparently replace the objective standard of disclosure with a subjective standard which gives undue deference to the wishes of the submitter of information.

Most of the complaints about Exemption 4 have been directed not to its scope, but to its administration, i.e., agency personnel allegedly make mistakes and release confidential information which should be withheld as exempt before giving submitters a chance to object. In addition, it is claimed that private parties are reluctant to disclose sensitive materials

to government agencies because of a "perception" -- which, to our knowledge, has never been substantiated -- that the records will become public knowledge, notwithstanding Exemption 4.

The short answer to these concerns is that procedural reforms would provide notice and substantive rights to submitters, and these should to a long way to alleviating the specific concerns which the business conmmunity has expressed, as well as any perception problems. We would urge you to make these reforms without amending Exemption 4 and see if that approach does not address the concerns which have been expressed.

There is, moreover, no evidence to warrant changing the language of Exemption 4 itself, as the pending bills propose. Indeed, Professor Russell Stevenson's recent report for the Admiristrative Conference of the United States concluded, after an exhaustive study of the issue, that there was no evidence warranting a change in the substantive scope of the exemption. "Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4" (1981). With one limited exception, neither bill explains what information which is now being released would be kept confidential under the new standard or what results the proposed amendment seeks to alter. Unless there are specific examples showing why existing language is being changed and to what the new language would apply, Congress should not be amending the language of Exemption 4.

In addition, we note that courts have uniformly protected genuinely sensitive commercial information which has been submitted to agencies and which are the sort of records Congress indivated should be subject to withholding. These records include:

-- data revealing assets, profits, losses and market shares, see, e.g., Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), on remand, 547 F.2d

673 (D.C. Cir. 1976); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974);

-- detailed reports about natural gas reserves data and intrastate sales information including names of purchasers, dates and locations of sales, sales volume and price terms, see, e.g., Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); Union Oil of California v. FPC, 542 F.2d 1036 (9th Cir. 1976);

-- data describing a company's workforce from which competitors could deduce labor costs, profit margins, competitive vulnerability and predict product and process changes, see, e.g., Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977);

-- information relating to government contracts, see, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979); Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980); Shermco Industries v. Dep't of Air Force, 613 F.2d 1314 (5th Cir. 1980).

While the cases finding Exemption 4 applicable are legion, it bears noting that few courts have rejected Exemption 4 claims. In addition to the cases described here, there are only a handful of decisions rejecting an Exemption 4 defense, and most of these cases concern internal government witness statements, which, in any event, would more properly be protected under Exemption 5. See, e.g., Brockway v. Dep't of Air Force, 518 F.2d 1184, 1188 (8th Cir. 1975); Rabbitt v. Dep't of Air Force, 383 F. Supp. 1065, 1068 (S.D.N.Y. 1974).

With this introduction, then, we would like to discuss the specific proposals to amend Exemption 4 in order to demonstrate their great breadth.

-- exempting "research information." The case of Washington Research Project v. HEW, 504 F.2d 239 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975), held that information submitted by a non-profit organization could not qualify under Exemption 4 because a non-profit organization could not suffer competitive harm. We have no objection to an amendment which would address the particular commercial vs. non-commercial distinction raised by Washington Research Project. However, the proposed language -- "research information" -- is much too broad and could cover a great deal of data submitted to agencies in which the public has an interest, e.g., animal test data submitted by drug companies to FDA which show adverse health impacts when a new drug was being tested.

-- expanding Exemption 4 to "other commercially valuable information." This standard is vague and could allow agencies to withhold records on a submitter's subjective claim that the information is "commercially valuable." Again, we would ask, "what commercially valuable information have courts ordered disclosed under the current law that should be protected? What case law needs to be overruled?"

The Administration suggests that this amendment would protect copyrighted materials submitted to the government where disclosure may impair the financial interests of a submitter (section-by-section analysis at 67). However, the cited example does not support the proposal. In order to perfect a patent or copyright, a party must submit the patented or copyrighted material to the Patent Office or Library of Congress. Interested parties may have access to such records, and the only restriction is that they cannot copy or use such records in violation of the patent or copyright laws, which action raises an infringement claim.

The point is that access is a different issue from infringement, a distinction which the Administration fails to

make, since its bill seems to assert that material under copyright should be exempt under Exemption 4. Perhaps the best way to deal with requests in this area is by notice to the holder of the copyright or patent in cases where the information is not available -- again, a procedural reform.

-- changing the first prong of the Nat'l Parks test from an examination of the "substantial competitive harm" from disclosure to an inquiry into whether release "may impair the legitimate private, competitive, financial, research or business interests of any person." This amendment would broaden the test from an objective examination of the degree to which substantial competitive harm would flow from disclosure to a subjective test under which a party could claim that a legitimate interest may be impaired, possibly on a purely subjective basis, possibly on nothing more than the basis that disclosure would risk embarrassment to the company.

This proposal is objectionable for three reasons: (1) the possibility that it will let the confidentiality interest be defined on the submitter's own terms; (2) the fact that the court and agency must examine not merely harm to the submitter, but harm to "any person"; and (3) instead of being "likely" to cause harm, the only inquiry is whether disclosure "may" impair someone's competitive financial research or business interest.

We understand that this change is supported as a means of reducing alleged uncertainty in the courts' interpretation of Nat'l Parks as well as reducing litigation. However, the only thing that is certain to flow from adopting this amendment is more uncertainty and more litigation. Moreover, the proposed standard has the potential to shield from the public any information that reflects adversely on a corporation's product or activities. This would include, for example, data submitted to the Food and Drug Administration showing that a widely-used prescription drug is unsafe or ineffective and information made available to the Department of Transportation

indicating that a certain model of car or tire is defective. The reasons favoring mandatory disclosure of this kind of information are strong: not only should the public be alerted to facts that affect its health, safety, and economic well-being, but the public must have access to this information in order to ensure that the government is acting in the public's best interest (for example, by withdrawing the license for the drug; recalling the tires, or requiring the company to live up to its warranties or refund the purchase price of the defective product). On the other hand, there is no justification -- short of public relations concerns -- for withholding such information from the public. However, even under the "legitimate" business interest standard, the company may argue that premature disclosure of this information (before it is adequately tested, etc.) would unduly alarm the public and cause injury to the company's sales.

As noted earlier, courts are now protecting genuinely confidential business information under the Nat'l Parks standard. If there are any records now being disclosed under Exemption 4 which the Committee or the corporate community believes should be protected, we are willing to address those concerns. However, adopting these amendments is not the answer. It took the courts seven years before they devised the Nat'l Parks test, and it is inevitable that courts will take at least that long to come up with a working definition of what is a "legitimate" business or what "may impair" actually means. These terms are, by their very nature, so porous that Congress is inviting new litigation which will create nothing but greater uncertainty for corporations concerned about public disclosure of records they submit to federal agencies.

-- "legitimate business interests." We understand the intent to make Exemption 4 unavailable if disclosure is desirable because of some overriding public interest, e.g., a

company has dumped chemical waste in the water suply near a residential area or distributed foods which pose a threat of botulism. However, the way this amendment is written, it could have the opposite effect and allow companies to conceal wrongdoing or other activities which might be embarrassing to the company but of interest to the public. For example, disclosure that a company is selling defective tires could effect its credit rating, competitive position and profits -- all of which are "legitimate" business interests which may be "impaired" by disclosure.

REVERSE FOIA PROCEDURES

Currently, there are no procedures under the FOIA to allow submitters of records which may be exempt under Exemption 4 to file comments opposing disclosure or bring suit to prevent disclosure under the FOIA. Submitters now bring such suits under the Administrative Procedure Act, and current practices in such cases can make it hard for requesters to oppose withholding and to receive access to records in a timely fashion.

Section 9 of S. 1730 and sections 4 and 5 of S. 1751 would make a number of reforms in the way that agencies process records which are claimed to be exempt from disclosure under Exemption 4 of the FOIA. We support the establishment of procedures which are fair to both requesters and submitters, and, as we discussed in our comments on Exemption 4, we believe that procedural amendments will take care of the concerns expressed by corporate submitters in this area, i.e., the alleged "perception" that business records are disclosed freely. After commenting on the various aspects of each proposal, we would like to offer our own proposals in this area, including some draft language.

Notice of request to submitter. The Hatch bill would give agencies ten working days to give notice to submitters, while the Administration provides no deadline. We suggest

five working days is enough time, since all that is required is sending out a letter to any submitters. Besides, there is still an interest in disclosure which is as prompt as possible and undue delays should not be built into the system here, where there is no risk of agency error.

Comments from submitter. Here again, we believe that the submitter should only have five working days to send in written comments against disclosure, instead of the ten working day period proposed in both bills. Such a short period of time is especially appropriate if the agency has procedures whereby submitters can "tag" information as exempt when they submit it. A short deadline encourages submitters to respond more quickly and lets the agency process the request that much more quickly. In addition, we would propose that the requester be given access to the non-exempt portions of any statement filed by a submitter.

No notice to submitter necessary. We believe, as the Administration bill proposes, that there should be some limited circumstances where notice to the submitter should be unnecessary, e.g., when disclosure is barred by another statute.

Request for an ex parte hearing. This proposal is contained in the Hatch bill if requested by the submitter within five working days after receipt of the request. We strongly oppose writing this proposal into law. Submitters should be able to state their objections in writing, as they do now both in court and before agencies which have procedures to tag records as exempt. In addition, the requirement of an ex parte hearing in all but a handful of cases puts an enormous burden on agency resources, particularly if the submitter does not live in Washington and wants a hearing near his place of business. Also, a mandatory ex parte hearing requirement raises questions about how such hearings should be conducted, i.e., in accordance with the

Administrative Procedure Act, with stenographic record or what? Finally, such a requirement builds inordinate delay into the process without materially improving agency decision-making. There is nothing to prevent companies from picking up the telephone and informing an agency verbally of its objections or responding to any questions the agency may have about the written statement. Such contacts could continue without writing an ex parte hearing into law.

Extending time for initial agency decision. The ten working days for an agency decision should begin to run after receipt of any written comments or expiration of the time for filing such comments. We disagree with S. 1730's approach under which agencies could extend the decision time for 30 days if certain specified "exceptional circumstances" are proven.

Deadline for initial decision. We propose giving the agency a deadline of ten working days after receipt of written objections to make its initial decision. In effect, this allows the agency to stretch the time for decision to roughly 20 working days following receipt of the request. We disagree with S. 1730's proposal to extend this period to 30 days after receipt of written objections, or, if an ex parte hearing is held, after that hearing. This builds too much delay into the process.

Limitations on disclosure. Once an agency has made its final decision to disclose records in a case where objections have been filed, the agency should be able to delay release for ten days unless "failure to disclose . . . would injure an overriding public interest and is not otherwise prohibited by law." This approach is similar to that taken by the Administration, and in such a case the decision to release is reviewable as an abuse of discretion. This proposal must be read in conjunction with the venue provisions elsewhere in this section. If agencies are allowed to put a ten day hold

on disclosure, a submitter will have an unfair advantage over the requester, as the former will be able to rush into court and have the case determined in the submitter's choice of forum. In effect, a ten day hold without liberal venue provisions would mean that requesters will always lose a race to the courthouse which they could never win. Our support of a ten day hold is designed to respond to corporate concerns that agencies will improperly or carelessly disclose records without enough time to sift through and disclose only the non-exempt portions. If, however, Congress does not include liberal venue provisions to help balance the scales, we would suggest that no ten day hold provision be included, and the race would be won by the first to file.

Requester's exhaustion of administrative remedies. We propose no change in this area. The Administration bill proposes a 90 day statute of limitations on filing an FOIA suit, not only in an Exemption 4 context, but across the board. We oppose this proposal, because 90 days is too short a time frame. Statutes of limitations are more commonly one year or more, and besides, a requester can evade the limitation simply by filing a new FOIA request for the same materials. S. 1730 sets up an elaborate framework which also limits a requester's ability to get into court, which we oppose.

Basis of litigation. All proposals give the submitter the right to sue under the FOIA. We do not object to this approach.

Standard of review. The pro-disclosure purposes of the FOIA are best suited by maintaining the de novo standard of review in all suits brought by a requester, while continuing to hold submitters to the test of showing the agency action was "arbitrary and capricious." Both bills would establish de novo review in all reverse FOIA suits on all issues, even the exercise of discretion. Maintaining the current de

novo/arbitrary and capricious distinction is fair to both sides. Under both bills, the submitter has the right to make a full submission to the agencies, a process in which the requester is excluded. This reform helps create a record of agency decisionmaking for a court to review on the "arbitrary and capricous" standard, thus eliminating the criticism that agencies often decide to release records with virtually no record and a submitter has an almost impossible time of proving that the agency acted arbitrarily and capriciously.

Jurisdiction over parties. We agree with the Administration's proposal to establish personal jurisdiction over both submitters and requesters and to require the agencyto notify interested parties on the other side when the agency is sued. S. 1730 has no provision in this area.

Venue and transfer. We agree with the Administration that current venue provisions of the FOIA should be applied to reverse FOIA suits brought by submitters and that a requester who isjoined or must intervene in such a suit should be able to have the suit transferred to a forum where he or she could have filed suit, unless good cause is shown to retain the suit in the district chosen by the submitter.

In camera submissions. To the extent that the Administration wants to include a provision authorizing in camera submissions in reverse FOIA cases, we believe such a change is unncessary, since they are already permitted under present law. Moreover, we do not believe that such records should automatically be kept under seal. It is not now automatic in national security cases, and the rationale is surely no greater than for trade secrets. Secrecy should not become the norm in these cases.

Attorneys' fees. We support the Administration's proposal to let requesters recover attorneys' fees against the United States in reverse lawsuits as well as traditional FOIA suits and further agree that requesters should be able to recover

fees against submitters under the same standards now used to allow fees against the United States. This approach is consistent with the pro-disclosure thrust of the FOIA, and in many cases the agency may agree to disclosure once suit is filed, only to have prompt disclosure blocked when the submitter intervenes and raises a host of objections rejected by the agency. An alternative approach to assessing fees against submitters directly is to allow courts to assess fees against the United States and allow the agency to collect a share from submitters as a form of contribution.

We would like to submit for your consideration an amendment which would incorporate the changes we propose in this area:

(a) Section 552(a)(4)(A) of title 5, United States Code is amended --

(1) by inserting "(i)" immediately after "(4)(A)"; and

(2) by adding at the end thereof the following:

"(ii) Each agency shall proposed for public comment and promptly issue regulations specifying procedures by which --

"(I) a submitter may, at the time its submits records to an agency, designate whether these submitted records or any portion thereof may be withheld from disclosure under subsection (b)(4);

"(II) the agency shall, when a submitter has designated records in accordance with clause (ii)(I) at the time of submission, notify the submitter within five working days of receipt that a request for records has been made under this section; and

"(III) a submitter may submit to the agency written argument regarding a request made for disclosure of records submitted by it within five working

days after receipt of such notice from the agency."

"(iii) An agency is not required to notify a submitter of the receipt under clause (ii)(II) if --

"(I) the disclosure is pursuant to law (other than this section) or an agency rule which requires disclosure of specific records in such a manner as to leave no discretion to the agency; or

"(II) the information has been published or otherwise available to the public."

"(iv) The agency shall, upon receipt of written argument submitted pursuant to this subsection, supply the requester with a copy of such written argument to the extent that it may not be withheld under subsection (b)(4)."

(b) Section 552(a)(4) of title 5, United States Code, is further amended --

(1) by striking out subparagraph (B) and inserting in lieu thereof the following:

"(B)(i) The district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia has jurisdiction --

"(I) on complaint by a requester, to enjoin the agency from withholding agency records and to order the production of any agency records withheld from the requester; and

"(II) on complaint by a submitter, to order an agency to notify a submitter of a request as required by subparagraph (A)(ii), and to enjoin the agency from disclosing agency records obtained from the submitter.

"(ii) The agency which is the subject of a complaint under this section shall promptly, upon receipt of a complaint --

"(I) seeking the production of records, notify each submitter who has submitted written argument to the agency that the complaint was filed; and

"(II) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(iii) In an action based on a complaint --

"(I) by a requester, the court shall have jurisdiction over any submitter of records which are sought by the requester, and any such person may intervene as of right in such action; and

"(II) by a submitter, the court shall have jurisdiction over any requester of the records which the submitter seeks to have withheld, and any such requester may intervene as of right in such action.

"(iv) Unless the court otherwise directs for good cause shown, in an action in which a requester is an intervenor or is joined as a defendant, the action shall on motion of the requester be transferred to a district court where such action might have been brought by the requester."

(2) by redesignating subparagraphs (C), (D), (E), (F) and (G) as subparagraphs (D), (E), (F), (G) and (H), and by inserting immediately after paragraph (B) the following new subparagraph:

"(C)(i) In an action under this section seeking the production of records, the court shall determine

the matter de novo, and the burden is on the agency to sustain its determination.

"(ii) In an action under this section seeking the withholding of records, the court shall review the record of the agency's proceeding and shall uphold the agency's determination unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(iii) In any action under this section, the court may examine the contents of the requested agency records in camera to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section.";

(3) by inserting "and any intervenor" immediately after "the defendant" in subparagraph (D)(as redesignated) and inserting in lieu thereof "by a requester and award such fees and costs to a requester who has substantially prevailed."

(4) by striking out "in which the complainant has substantially prevailed" in subparagraph (F)(as redesignated) and inserting in lieu thereof "by a requester and award such fees and costs to a requester who has substantially prevailed."

(c) Section 552(a)(6) of title 5, United States Code, is amended --

(1) by striking out clause (i) of subparagraph (A) and inserting in lieu thereof the following:

"(i) determine within ten working days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the requester and any person who has objected to disclosure of the records sought of such determination and the specific statutory basis therefor, and

of the right of such person to appeal to the head of the agency any adverse determination; and"

(2) by striking out "or" at the end of clause (ii) of subparagraph (B) and by inserting immediately after clause (iii) the following new clause:

"(iv) the need to notify the submitter of the receipt of the request and to afford him an opportunity to submit additional argument regarding disclosure of the records sought."; and

(3) by striking out subparagraph (C) and inserting in lieu thereof the following:

"(C)(i) Any requester under this section shall be deemed to have exhausted his administrative remedies with respect to a request if the agency fails to comply with the applicable time limit provisions of this paragraph.

"(ii) If an agency can show that exceptional circumstances exist and that it is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

"(iii) If any requester files a complaint under subparagraph (4)(B), the administrative remedies of any submitter of records which are the subject of such request shall also be deemed to have been exhausted.

"(iv) Upon any determination by an agency to comply with a request for records, the records shall be promptly made available to the requester, except that if the disclosure of records was objected to by a submitter of the records, the agency shall not disclose such records for ten days after notice of the determination required by subparagraph (A)(i) has been sent to the submitter, unless failure

to disclose within less time would injure an overriding public interest and disclosure is not otherwise prohibited by law.

"(v) Any notification of a final denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and shall include the specific statutory bases for withholding and a statement that there are no reasonably segregable portions of the records which can be disclosed.

(d) Section 552(d) of title 5, United States Code, is amended --

(1) by striking out "subsection (a)(4)(F)" in paragraph (4) and inserting in lieu thereof "subsection (a)(4)(G)"; and

(2) by striking out "subsection (a)(4)(E), (F), and (G)" in the second sentence and inserting in lieu thereof "subsections (a)(4)(F), (G) and (H)".

(e) Section 552 of title 5, United States Code, is further amended by adding at the end thereof the following new subsection:

"(f) For the purposes of this section --

"(1) 'submitter' means a person who has submitted to an agency trade secrets and commercial or financial information which is privileged or confidential within the meaning of subsection (b)(4); and

"(2) 'requester' means a person who makes or causes to be made, or on whose behalf is made, a request for records under this section."

PERSONAL PRIVACY

Currently, Exemption 6 allows the withholding of "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Section 11 of the Hatch bill and section 7(c) of the Administration's bill would expand the scope of this Exemption. The section-by-section analysis of both bills suggests that some courts have recently focused on Exemption 6's opening clause -- "personnel and medical files and similar files" -- as creating a mechanical threshold requirement which must be met before privacy can be invoked to bar disclosure. As a result, it is claimed that intimate personal information, the disclosure of which is "clearly unwarranted," might be disclosed because it is not contained in a "similar file."

We first want to emphasize that we believe the courts have been appropriately sensitive to the privacy concerns which Exemption 6 was designed to protect. Where the information at issue is not of an intimate or highly personal nature and there is a public interest favoring its release, the courts have correctly tipped the balance in favor of disclosure. The public has an overriding right to information concerning, for example, whether a government official is properly performing public duties, even if the disclosure of that information might prove potentially embarrassing to the individual. Moreover, where the information is already a matter ofpublic record, see, e.g., Washington Post Co. v. Dep't of State, 647 F.2d 197 (D.C. (D.C. Cir. 1981), pet. for cert. granted, S. Ct. No. 81-535, the courts are plainly correct in giving less weight to the government's claims of harm.

We would not object, however, to an amendment which would clarify Congress's original intent that agencies and the courts balance personal privacy claims against the public interest in disclosure, rather than focusing on the kind of file in which the information is contained. Thus, we would propose that Exemption 6 be amended to read as follows:

> personnel and medical files and similar information concerning an individual, the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy.

This amendment changes the wording of Exemption 6 to require agencies to focus on "information," thereby eliminating the "similar files" language which has been the subject of so much concern. The information must still be of a highly intimate, personal nature in order to qualify for this exemption, and, even where some privacy interest is involved, the courts must continue to consider whether disclosure would be "clearly unwarranted." However, retention of the "clearly unwarranted" standard is of the utmost importance, as case law has evolved to the extent that agencies are instructed to weigh the interest in disclosure against the interest in personal privacy, tipping the balance in favor of disclosure. This is consistent with the underlying pro-disclosure philosophy of the FOIA.

While the elimination of the "similar files" test should put to rest any valid criticism of current interpretations of the Act, S. 1730 proposes far broader changes with which we disagree. Section 7(c) would permit withholding "if the individual could reasonably object to it because of . . . possible adverse effects." These effects are defined in the section-by-section analysis as including "physical, mental, financial, social or other types of harm," an extremely vague standard that would prevent public access to a wide range of information of significant public concern, particularly information involving the performance of public duties by government officials. For example, in one case we represented NBC newsman Carl Stern, who was attempting to learn the results of an investigation by the Small Business Administration into charges that three of its employees had discriminated against applicants for assistance on the basis of race, sex or marital status. The court ruled in Stern's favor in that case, but we are concerned that the sweeping changes proposed in S. 1730 might be interpreted

as allowing government agencies to conceal information on how they are doing their job, not because disclosure would reveal some intimate, personal detail about an employee, but simply because it might put individuals in a bad light with respect to how they carried out their job.

Moreover, the various types of "harm" that would be encompassed by this provision are already taken directly into account in other exemptions, e.g., Exemptions 4 and 7. This amendment would therefore unnecessarily sanction the withholding of far greater amounts of information, the limits of which are nowhere defined. This broad substantive change should therefore be rejected, since there is no evidence that the courts which have engaged inthe balancing required under present law have failed to afford adequate protection to legitimate privacy interests.

We would not in closing that an amendment to Exemption 6 may prove to be unncessary, as the Supreme Court on Monday agreed to decide the Washington Post case. That case involves the issue of whether naturalization records already on public file can be withheld on the ground that disclosure would threaten the lives of the two invididuals about whom the Post is seeking confirmation of their citizenship.

LAW ENFOPCEMENT RECORDS

Currentlv, FOIA's Exemption 7 provides a discretionary basis for denying access to "investigatory records compiled for law enforcement purposes," but only to the extent that disclosure would result in one or more of six specified harms: interference with enforcement proceedings; deprivation of fair trial or impartial adjudication; unwarranted invasion of personal privacy; identification of a confidential source or, in certain circumstances, information furnished only by a confidential source; disclosure

of investigative techniques and procedures; or, endangering the life or physical safety of law enforcement personnel.

S.1730 would eliminate "investigatory" as a qualification for exemption and would amend Exemption 7 to cover "records maintained, collected, or used for law enforcement purposes." Three of the six specified harms would be amended to address: privacy of a natural person who has been deceased for less than 25 years; releases which would "tend to" disclose the identity of a confidential source, "including a state, local or foreign government which furnished information on a confidential basis;" and, endangering the life or physical safety of "any natural person."

S.1751 would similarly eliminate "investigatory" as a qualification for exemption and would amend Exemption 7 to cover "records and information compiled for law enforcement purposes." Four of the six specified harms would be amended to address: "investigatory information relating to an ongoing investigation or enforcement proceeding" (i.e., eliminating the need to show disclosure would "interfere" with such proceedings); releases which would "tend to" disclose the identity of a confidential source, "including any foreign, state, or other public agency or authority or any private institution that furnished information on a confidential basis;" disclosure of "techniques, procedures, guidelines, or priorities for law enforcement investigations or prosecutions;" and, endangering the life or physical safety or "any natural person." In addition, the bill would add a seventh category of harm for disclosure of information "relating to such categories of investigations of terrorism, organized crime, or foreign counterintelligence as are defined by the Attorney General by regulation or order." (Note: No showing of harm would be required; these are generic exemptions.)

Comments and Recommendations

"Investigatory" -- Our examination of the caselaw interpreting Exemption 7 leads us to conclude that the deletion of the qualifying terms "investigatory" from the threshhold standard for considering application of this exemption would not unduly broaden the scope of the exemption. Since the proposed amendments in both bills would continue to apply Exemption 7 only to records whose existence is directly linked to "law enforcement purposes," it would appear that the amended exemption would provide no more of a rationale for protecting records which are compiled pursuant to the abuse of investigative authority, i.e., for political purposes, than would the exemption as presently qualified by the term "investigatory". Moreover, deletion of the term "investigatory" would, as discussed elsewhere in our testimony, facilitate the protection of law enforcement manuals and instructions under Exemption 7 so as to avoid eliminate any reason for distorting the established meaning interpretations of Exemption 2 to serve such a purpose. This, in our view, would be an adequate justification for removing deleting the "investigatory" requirement. To best maintain this continuity, we would favor the formulation in S.1751, which retains the term "compiled," over the one in S.1730, which would substitute "collected, maintained, or used."

Exemption 7(A) -- S.1730 would not change this provision and we would oppose the proposed amendment in S.1751 as unwarranted. By eliminating the need to show that disclosure would "interfere" with enforcement proceedings in favor of a showing that information "relating" to "ongoing" proceedings would be revealed, S.1751 effectively would eliminate the agencies burden to show harm from disclosure. The fact that related information would be revealed does not necessarily mean that there would be any

adverse effect from disclosure. Moreover, the emphasis on the information's relation to "ongoing" investigations or proceedings requires agencies only to examine whether an investigation is "open" or "closed", giving them an incentive to keep files "open" long after the investigations are over for all practical purposes. This amendment could severely restrict public knowledge of agency investigations, even years after the investigation has de facto ended. For example, the Martin Luther King, Jr. and Karen Silkwood cases might be officially "open", even though the FBI has not actively pursued leads in those cases for several years.

This amendment could have a chilling effect not only with respect to agencies principally charged with law enforcement, but also with agencies with a variety of duties, including law enforcement. for example, private parties may seek access to SEC files for the purposes of bringing private shareholder suits in cases which the Commission decides, for personnel or other reasons, not to bring an action on its own. The Commission has regularly stated that such private suits are an important means of upholding the securities laws and protecting investors, but access to such records could be cut off if pertinent records were kept in nominally "open" case filed.

Similarly, the Justice Department may decide, after investigation, that it should not devote the resources to bringing its own antitrust action, but may want to keep the pertinent records in its files for possible future action. Private parties injured by the company's actions may seek to bring a private antitrust action relying, in part, on the Antitrust Division's records. Once again, such enforcement of the antitrust laws, critical to the smooth functioning of our market economy, could be hampered simply because an agency employee stamps the file "open" instead of "closed."

We believe that the current language correctly strikes the balance between the public's right to know, on the one hand, and, on the other, the government's ability to investigate and enforce the law.

Exemption 7(C) -- Under the current law, records can be withheld under this exemption to the extent that disclosure would "constitute an unwarranted invasion of personal privacy." S.1730 would amend this to protect "the privacy of a natural person who has been deceased for less than 25 years." We oppose adoption of this proposal on the grounds that common law has traditionally denied dead people any right of privacy. Moreover, this proposal could restrict public access to information in which the public has a legitimate interest, e.g., FBI efforts to discredit Martin Luther King, Jr. and certain aspects of the investigations into the assassination of the Kennedys.

Exemption 7(D) -- Both bills would amend this provision to cover information which would "tend to" disclose the identity of a confidential source, and both would extend the meaning of "confidential source" to cover state, local and foreign governments which furnished information on a confidential basis. S.1751 would go further than S.1731 to include "private institutions" within the rubric of "confidential source."

We understand the agencies' complaint that the present form of Exemption 7(D) appears to require that disclosure of a source's identity be a certainty before the agency would be permitted to withhold the information under this exemption. We believe, however, that the phrase "tend to" would swing the required agency showing all the way from the asserted "certain" disclosure to a mere conjectural possibility of disclosure. Such a standard would thus permit agencies to withhold a good deal of information which would not, in

fact, disclose the identity of a confidential source and which therefore should be released if not otherwise exempt. A fair alternative which would strike a balance between the current language and the "tend to" proposals would be to exempt records if their production "reasonably could be expected to" disclose the identity of a confidential source. This standard is an objective one which has been the subject of extensive judicial review in cases involving national security information that is classified pursuant to Executive Order 12065. The President has determined that this standard is sufficient to protect foreign sources and there is no reason to believe it would not fully protect domestic sources. It would give the agencies an additional margin of safety without fostering judicial consternation over whether the release of a given record would have a "tendency" to disclose the identity of a confidential source.

While we acknowledge the considerations that counsel inclusion of foreign governments within the meaning of "confidential source", we cannot agree that state and local governments and private institutions should necessarily be accorded the same treatment. the court decisions which have applied Exemption 7(D) to protect the "identities" of government entities in this context have relied primarily on the policy argument that their cooperation with federal law enforcement agencies might otherwise be impaired. See, e.g., Lesar v. Department of Justice, 636 F.2d 472 (D.C.Cir. 1980); Church of Scientoloty v. Department of Justice, 612 F.2d 417 (9th Cir. 1979); Nix v. United States, 572 F.2d 998 (4th Cir. 1978). While this may seem a reasonable concern with respect to foreign governments, we would question whether the underlying assumption, in the context of state and local governments, actually serves the public interest.

If we are bound to avoid jeopardizing the confidentiality commitments which state and local agencies may themselves

have made in connection with the information they have furnished to federal law enforcement agencies, this can be accomplished without affording confidentiality to the agencies themselves in their transaction with the federal government. Honoring the promises of confidentiality that such agencies may have made in originally obtaining the information does not necessarily require the federal government to make a promise of confidentiality to the agencies themselves in order to obtain the information from them. Unless it can be shown in each instance that the former is necessarily dependent upon the latter, federal law enforcement agencies should be bound only to safeguard the confidentiality of the state and local agencies' sources, and not to safeguard the confidentiality of the agencies themselves.

There is something quite disturbing about the notion that government institutions in a democratic society must be afforded anonymity in their transactions with each other in order to insure continued mutual cooperation. This is particularly true when the public business that is being transacted is the enforcement of the laws. If government institutions insist that such transactions of public business must be labeled "not for attribution," how is the public supposed to have any faith in the integrity of such institutions? If the principles of federalism and comity have any present meaning, can we truly imagine the FBI or the Secret Service being denied critical investigative information merely because they may sometime reveal that they obtained it from a major state or metropolitan police department?

We would urge the Congress to send a different message to local, state, and federal agencies and the people in whose name they act. We would also urge Congress to reject the inclusion of "private institutions" within the meaning

of confidential source, lest organizations such as the Western Goals Foundation delude themselves into believing that the federal government has somehow sanctioned their collection of computerized files on the lawful activities of Americans whose political beliefs they despise.

Finally, we would oppose S.1751's deletion of the word "only" from the exemption's protection of confidential information furnished "only" by a confidential source in the course of a criminal investigation. Far from misconstruing the meaning of the provision, as claimed by the Reagan Administration, the federal courts have recognized that there are strong public policy interests which counsel against granting confidentiality to all information furnished by a confidential source. Moreover, there is no legitimate confidentiality interest in the information provided by a confidential source (as opposed to the identity of the source) when the identical information has been obtained elsewhere. The critical policy underlying Exemption 7(D) is the protection of the identity of a particular confidential source, and this would not be served by providing confidentiality for information which was furnished by other sources as well. On the contrary, deletion of the word "only" would eliminate the determinative factor that disclosure of information furnished only by one individual might lead to the identity of the individual precisely because of its singular nature.

Exemption 7(E) -- We object to S.1751's proposed expansion of this exemption to cover "guidelines, or priorities for law enforcement investigations or prosecutions." For the same reasons stated in our discussion of the proposed exemption for law enforcement manuals and instructions, we cannot endorse a per se exemption for any materials for which the public interest in disclosure is evident but the harmful impact from disclosure is not.

Exemption 7(F) -- now allows withholding if the life or physical safety of "law enforcement personnel" would be endangered. This exemption is too narrow and should be expanded to protect the life and physical safety or "any natural person," as both S.1730 and S.1751 propose.

Proposed Exemption 7(G). S.1751 would add a new exemption to let the Attorney General exempt, by regulation or order, information relating to investigations of terrorism, organized crime or foreign counterintelligence.

We oppose this proposal because it is unnecessary and overbroad: unnecessary, because such investigations can already be protected under the existing Exemption 7, and overbroad, because it leaves to the Attorney General too much discretion to define such controversial words as "terrorism" or "organized crime" or "foreign counterintelligence." Moreover, like other proposals in S.1751, it seeks to deny access to records of unquestioned public interest without any showing that disclosure would adversely effect some legitimate government interest. For this reason, alone it must be rejected, otherwise the purpose of the Act and the lessons of the Church and Pike Committee investigations will be run roughshod under the executive expediency and secrecy.

Informant Records by Name or Personal Identifier - S.1751 would amend the FOIA so that the Act would not apply to informant records maintained by law enforcement agencies under an informant's name or personal identifier when access is sought by a third party.

While we are sympathetic to the aim of this proposal, as stated in the Administration's commentary on the bill, we believe the amendment will not succeed in achieving its aim. Although it might work in its limited context of third-party requests, it will not prevent access to such records in first-person requests, which fall under the Privacy Act as well as the FOIA.

Suppose, for example, that crime boss X suspects that one of his six closest associates is an FBI informant. The proposal would prevent the crime boss from requesting their files under FOIA, or at least it would allow the FBI to avoid flagging one of the associates as an informant by responding that the records are exist and are exempt under Exemption 7(D). This, however, would not prevent X from ordering each of his associates to request their own files from the FBI and to hand over the replies to X unopened.

We would urge the Administration to reassess the problem, rather than enact a flawed remedy that is easily circumvented.

ACCESS TO RECORDS

Currently, the FOIA allows a request to be made by "any person," and no new legislation is needed, as it would restrict this right. Nonetheless, proposals have been made to amend this provision, which we will discuss in turn.

Section 2(b) of the Administration bill and section 13 of the Hatch bill would limit the ability of certain persons to make FOIA requests.

United States person. Section 2(b) of the Administration bill limits the right to make an FOIA request to a "United States person," defined elsewhere in the bill as a United States citizen, an alien lawfully admitted for permanent residence, and certain corporations and unincorporated associations. The definition follows the definition in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801(i)). In order to effectuate this change, agencies can issue rules to require a requester to declare that the requester -- or person on whose behalf the requester acts -- is a United States person, at the risk of having the request rejected.

Our objection to this proposal is partly philosophical, but mostly practical. Philosophically, making information available according on one's citizenship is a tremendous

restriction. In addition, the proposal marks a retreat from the traditional notion that only the exemptions, not the identity of a requester, should be pertinent in processing FOIA requests.

The proposal has been justified as meeting the concern that agency records are available to anyone, even the KGB. From a practical standpoint, however, we doubt that the KGB, to the degree it relies on the FOIA, will be deterred by this restriction. Besides, the existing exemptions are adequate enough to keep the KGB at bay. The people who will suffer under this proposal are foreign journalists and scholars who make use of the FOIA. It makes little sense to say that scientific information in an agency file should be available only to American scientists, but not to European scientists, or that only American historians should have access to government files, not foreign historians.

Moreover, the proposal will surely add to delays in processing and create a whole new layer of paperwork, as agencies will be forced to require requesters to show that not only is a requester a bona fide "United States person," but also that the person on whose behalf the request is being made is a "United States person." To the extent that this proposal is not totally unenforceable, it will probably do nothing more than generate considerable new costs involved in proving a requester's stake, not to mention the enormous additional number of papers that will have to be submitted and filed, and it is doubtful that the benefits exceed them.

Felons. Section 13 of S. 1370 allows OMB to adopt a rule t limit FOIA or Privacy Act requests made by felons or prisoners or persons requesting records on or their behalf. As in the "United States person" proposal, this proposal is also certain to raise administrative costs, as agencies engage in needless paperwork over the issue of whether the requester

is a felon or someone acting on their behalf. While we understand that law enforcement agencies receive a number of their FOIA requests from prisoners, the cost of complying with such requests can be reduced by imposing search and copying fees in line with the fee proposals made elsewhere in our comments, since the requested information is usually sought for non-commercial private use and there is no public interest in disclosure. Also, while it is probably that nearly all prisoner requests come from persons who are guilty, the possibility that an FOIA request may help free an innocent person, lead to a reduction of an overly harsh sentence or facilitate a grant of parole should not be ignored.

FOIA AS A DISCOVERY TOOL

Currently, there is no limitation on the purposes for which an FOIA request can be made.

Section 2(b) of S. 1751 would prohibit a party to a judicial or adjudicatory agency proceeding or any requester acting for such a party from using the FOIA as a discovery device. The prohibition would cover both civil and criminal proceedings, regardless of whether the United States or any federal agency or official is a party. In addition, the bill would allow agencies to issue a rule requiring that a requester (or person acting for a requester) not be a litigant in a related civil or criminal case at the risk of having the request rejected as improper.

We oppose this amendment, which the Administration favors on the ground that parties can obtain more records under the FOIA than they can through court or agency discovery rules and that the time spent responding to FOIA requests diverts government attorneys from preparing their substantive cases.

In the first place, this amendment is objectionable because it requires an inquiry into who the requester is and

why he or she wants the records. This is a major step away from the principle that the government should not be asking such questions in an FOIA context.

Second, the proposal is unduly broad. Parties are prohibited from using the FOIA to supplement or replace discovery in any case, even if the U.S. Government is not involved. This could increase costs and administrative burdens on the Government when agency records are sought in purely private litigation, e.g., a physician defending a medical malpractice claim may wish to obtain records regarding the plaintiff's prior treatment in a VA hospital. While the doctor could obtain such records presently under the FOIA, the Administration's proposal would require the doctor to subpoena the agency, creating more work and dragging the Government into private litigation.

Third, the proposal attacks a symptom, not the problem. The real problem is that agency and court discovery rules can be so cumbersome that they make preparation of one's case time-consuming, difficult and expensive. We note in this regard a recent press account showing that the Reagan-Bush Campaign Committee felt the need to use FOIA to cut through the red tape in its case before the Federal Election Commission. Instead of Congress simply saying "no" to FOIA requests in this area, we believe a better approach would be to examine discovery rules with an eye to streamlining their operation. Admittedly, that is a long-term solution, but a short-term solution is also available, namely, allowing agencies to recover the costs of review time when FOIA requests are made for commercial purposes. We have made this proposal elsewhere in our testimony, and we suggest it again as a means of letting agencies levy charges against commercial parties using the FOIA in this fashion.

Fourth, the proposal to limit the FOIA in this fashion

is bound to generate new paperwork and administrative burdens as requesters and agencies exchange numerous rounds of correspondence designed to establish the purpose and identity of the requester. This is one case where the cure may be worse than the disease.

Finally, the proposal does not reach requests made prior to the beginning of litigation. If the proposal takes effect, parties who now file FOIA requests after they sue or are sued will simply make sure they make the maximum number of FOIA requests as quickly as possible before litigation actually begins.

NATIONAL SECURITY INFORMATION

Currently, FOIA's Exemption 1 provides a discretionary basis for denying access to matters that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." Agency decisions to withhold records pursuant to this exemption are, like decisions pursuant to any of FOIA's other exemptions, subject to de novo judicial review (i.e., as if no decision had geen made and the court had to decide the issue of access in the first instance.)

S.1730 would do nothing to change the current standard for judicial review.

S.1751 would amend the FOIA so that in any case in which a record is withheld under Exemption 1 the court would be prohibited from enjoining withholding unless the agency's action is determined to be arbitrary and capricious. In all other cases, the court would still determine the matter de novo.

Comments and Recommendations

We strongly object to the Administration's proposal to eliminate de novo judicial review in cases involving national security information.

In 1974, Congress, by a wide margin, overrode President Ford's veto in order to provide for de novo judicial review of agency withholding decisions. It advocated this standard only after exhaustive hearings in both Houses had produced substantial evidence to support allegations of pervasive overclassification of national security information. See U.S. Government Information Policies and Practices., Hearings, (9 Parts) House Government Operations Committee, 92d Cong., 1st and 2d Sess. and Executive Privilege, Secrecy in Government, Freedom of Information., Hearings, U.S. Senate, 93d Cong., 2d Sess., Vol. I-III. Congress was further induced to action by the Supreme Court's holding in E.P.A. v. Mink, 410 U.S.73 (1973), which interpreted the language of FOIA as originally enacted, to mean that the mere fact of classification was sufficient to justify withholding. Justice Stewart, concurring in the Court's opinion, understood it to mean that FOIA, as originally enacted, provided "no means to question any Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." 410 U.S. at 95. Were it not for the requirement of de novo judicial review, this would still be the case.

The Supreme Court, in United States v. United States District Court, 407 U.S. 297 (1972), decisively rejected the contention that federal judges suffer from any debilitating lack of sensitivity or sophistication in matters of intelligence collection. Six years later, Congress added its strong support to the Court's position by enacting the Foreign Intelligence Surveillance Act of 1978, Public Law 95-511, which requires the Government to obtain a judicial warrant from a special secret court in order to conduct electronic surveillance within the U.S. for foreign intelligence purposes.

Far from "second-guessing" the classification determinations of the intelligence agencies, federal judges in FOIA litigation have, as a general rule, shown extreme deference to agency

expertise in giving "substantial weight" to agency affidavits explaining the reasons for withholding. See, e.g., Phillippi v. CIA, No. 80-1940, (D.C. Cir., June 25, 1981); Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980); Hayden v. NSA, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Founding Church of Scientology v. NSA, 610 F.2d 824 (D.C. Cir. 1979); Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978). In fact, courts have conceded that, in many cases, the "agency statement of threatened harm to national security will always be speculative to some extent", Halperin, supra, 629 F.2d at 149, and that "for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review." Hayden, supra, 608 F.2d at 1388.

Far from harming our classification system, de novo judicial review provides critical insurance of its integrity. It is clear from our experience with FOIA requests directed to the CIA, for example, that agency employees will devote a good deal more care to their classification responsibilities precisely because they know that their determinations may one day be reviewed by a federal judge. In such cases, the judge will not be deciding whether the agency's classification determination meets the court's standards of propriety, rather, the court will be looking to see if the agency has properly followed the classification standards and procedures that have been set forth by the President in an Executive Order.

In litigating such FOIA requests, it has been our experience that the prospect of de novo judicial review often makes the agency take a harder second look at its determination to withhold certain information. If, as often happens in the course of this re-examination, the agency finds it would not be able to justify its decision in the neutral perspective of the court, more material is released to the requester by the agency without the necessity of actually obtaining judicial review. See, e.g., Halperin v. CIA, Civ. Action No. 76-1082 (D.D.C., March 7, 1978)

(During pendency of the suit, the CIA released more than three-quarters of the records it had withheld).

The proposal in S.1751 would limit the court to review under an "arbitrary and capricious" standard. This would mean that, even if any agency such as the CIA had violated both the procedural and substantive requirements of the President's Executive Order on Classification, the court would be forced to uphold the agency's decision to withhold the records at issue unless the violations reached the level of "arbitrary and capricious" action. In practical terms, this means that the agency could get away with whatever improper classification would not reach the level of judicial intolerance for "arbitrary and capricious" administrative action.

There have been only a handful of cases in which the courts have ordered the disclosure of information that an agency claimed was properly classified. In each of these cases, the quantity of information was minimal. If there was harm to national security in the cases where disclousre actually occurred, it has apparently not been significant enough to come to the attention of the Congress, the press, or the public.

We see no justification for the proposed amendment and would strongly recommend that Congress follow the lead of S.1730, which proposes no change in this area.

NEW EXEMPTIONS

The Administration bill (S. 1751 § 7(g)) proposes two new exemptions: one concerning settlement of litigation and one concerning technical data which cannot be exported from the United States without an export license.

Settlement of litigation. A new Exemption 10 would allow agencies to withhold records generated in connection with settlement of legal actions in which the United States is a party or has an interest. We oppose this amendment,

which would overrule the March 1981 First Circuit opinion in County of Madison v. Dep't of Justice, 641 F.2d 1036.

In the first place, we disagree with the premise that the terms of a settlement agreement between the government and a private party should be withheld from public view. The reason is that litigation with the government is fundamentally different from litigation between private parties. When the government sues or is sued, it is acting on behalf of all citizens, who have an interest in learning how the litigation is settled, how much money the government is going to collect, how much money the government must pay out, what conditions are being imposed on the private party, (e.g., in antitrust or securities cases), and other information which is vital to citizen understanding of government activities.

Because of the breadth of this proposed amendment, the government could launch a massive securities case, spend millions of dollars to prosecute it and then settle it, without the public having any idea of what results were obtained or how wisely government assets were used in that litigation. In fact the SEC regularly enters into consent decrees with violators of the securities laws, the terms of which are often of interest to citizens and shareholders. In addition, it is not unusual for shareholders to file private suits for monetary damages even after the company has signed an agreement with the SEC, and information uncovered by the Commission in its investigation can be helpful to such private enforcement of the securities laws, which the SEC and Supreme Court have acknowledged is an important policy goal which cannot be achieved by the SEC alone. Enacting this exemption could thus thwart shareholder efforts to pursue stock fraud and other violations.

The breadth of this proposal would let agencies thwart the pro-disclosure purpose of the FOIA, e.g., by agreeing to

keep confidential a variety of records relating to the private litigant which the public may have a legitimate interest in learning. Agencies generally are neutral at best about their obligations under the FOIA, and they are not likely to put up much of a fight when a private litigant asks for secrecy.

The considerable scope of the amendment could also shield from public view terms of the settlement which are of interest to the public, e.g., is the government agreeing to pay attorneys' fees to a "liberal" public interest law firm which are substantially higher than the levels it is agreeing to pay to a "conservative" public interest firm for comparable work, and vice versa. Such favoritism could go on with great ease under the new exemption, and the public would have no idea how its money was being spent.

In addition, the Administration's argument is based on a false premise, i.e., that private litigants enjoy an iron-clad right not available to the government to settle cases and have records put permanently under seal. That is not so, and courts have held that seals may not be imposed forever and that even if a seal was in the public interest when imposed and even if a company submitted records voluntarily in reliance on the seal being in effect, disclosure of the protected records is appropriate after the passage of a few years. See, e.g., Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980); Miami Herald Pubishing Co. v. Collazo, 329 So. 2d 333 (Fla. App. 1976); Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977). In other words, this proposal could give parties in litigation with the government a broader protection than they would have if they were engaged in litigation with other private parties.

Finally, we note that some settlement records are already protected from disclosure under Exemptions 5 and 7. If Con-

gress seeks to enact an exemption in this area, we would recommend that it carefully consider exactly what records are not now protected that should be protected, consistent with the government's obligation to conduct and settle litigation with public knowledge of the terms of settlement. For example, Congress may wish to allow agencies to protect documents regarding failed settlement negotiations, as in County of Madison. If so, a narrowly crafted exemption is far preferable to a broad amendment for settlement records.

Technical data covered by export license. The Administration's proposed new Exemption 11 would let agencies withhold technical data that cannot be exported from the U.S. without an agency's approval or license, although the exemption would not apply if the requester obtained the appropriate approval, authorization or license. We question whether this amendment would work. Often the information is publicly available in the United States when in possession of private parties. If the government has possession and foreign policy issues are present, Exemption 1 is available.

"RECORDS" DEFINITION

Section 9 of the Administration's bill defines "records," but the proposal is unduly restrictive. The proposal covers "existing documentation," in order to ensure that the FOIA does not require an agency to generate a record in response to a request, as various courts have held, and this proposal is similar to the one proposed here. The program is inadequate because of its failure to address the Forsham problem, and the proposed exemption for diaries, journals, phone logs, desk calendars or personal or research notes is unduly broad and vague. In the first place, personal records, as opposed to "agency records," are already exempt under the FOIA, and personnel need not fear disclosure of such documents. There may be many times when an individual compiles records which should properly be considered "agency records." What the

proposal is attempting to do is overrule that portion of Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), in which the Supreme Court held that verbatim transcripts of the Secretary of State's official phone calls were agency records (although disclosure was barred on other grounds). Such records may contain valuable historical information of the sort which should be retained, and the FOIA should not be amended to throw a blanket over all records which some one might claim were created solely for "personal convenience."

We propose for your consideration the following amendment:

Section 552(e) of title 5, United States Code, is amended by changing the comma at the end of the word "section" to a dash, inserting "(1)" before the words "the term 'agency'", changing the period to "; and" and inserting at the end thereof the following:

"(2) the term 'records' shall include all records, whatever their physical form, including computer discs (but not including computer discs), but does not include system software in any form,

(A) which are in the possession of an agency or;

(B) which are not in the possesison of an agency, but which were (i) prepared or maintained by an agency and removed in violation of sections 2905 and 3106 of title 44, United States Code, or (ii) prepared on behalf of the agency with federal government funds, relate to a proposed, pending or final agency action and to which an agency is entitled to have access.

EXPLANATION

This amendment tracks a draft recommendation of the Administrative Law Section of the American Bar Association and provides a definition for the word "records," which the FOIA

does not now define. In recent years, agencies have taken to claiming that certain records which they generated, are in their possession or were prepared under contract are not "records" within the meaning of the FOIA. A definition of "records" attempts to improve public access and end costly litigation on this issue. The amendment deals with some specific issues:

(1) The proposed amendment makes it clear that records which were prepared pursuant to a contract with or grant from an agency and which are relevant to an agency's regulatory action are "records" and disclosable under the FOIA, even if they are not in the agency's possession at the time the request is received. This amendment would overrule the Supreme Court's contrary holding in Forsham v. Harris, 445 U.S. 169 (1980), in which a consultant, acting under an HEW contract, conducted certain tests and submitted the results in a final report to HEW, which HEW then used in the course of proposing a new regulation. The requester sought access to the consultant's raw test data -- which had not been transmitted to HEW -- in order that he could evaluate the final report more thoroughly. The Supreme Court held that the raw test data were not "records" because HEW had never had them in its possession. By overturning this decision, Congress would be declaring that records prepared using federal funds and which are relevant to an agency proceeding should be publicly available. If, as in Forsham, the records are not in the agency's possession, an amendment to the FOIA's jurisdictional provisions elsewhere in this proposal would allow the requester to join the person in possession of the records in any litigation against the agency.

(2) There may be instances in which an agency has received and reviewed records submitted by private persons or corporations and has returned such records when it was

through with them. Under the proposed definition, such documents would be "records" under the FOIA, but only when they are actually in the agency's possession. In other words, the proposed amendment does not provide that documents submitted to an agency remain "records" under the FOIA even after they are returned to a submitter (assuming that the agency is not barred from keeping the records in issue on file). Thus, if a person requests access to data submitted by a corporation after the agency has returned the records in question or otherwise has disposed of the records in a manner which does not constitute a "wrongful removal" of the records, the request must be denied, and the requester may not sue to compel the agency to recover the records from the submitter.

While the proposed definition of "records" is intended to be very broad, there may be instances in which the agency will deny the request and such denial will not be an "improper withholding," the threshold requirement for bringing suit under the FOIA. This is most likely to occur when disclosure has been properly barred by another branch of government, e.g., a court order has enjoined release of certain records or a Congressional committee has loaned an agency the transcript of a properly closed executive session and in so doing, indicated that it was maintaining control over disclosure of the contents.

RECOVERY OF AGENCY RECORDS

Section 552(a)(4)(B) is further amended by adding at the end thereof the following:

"(v) In an action brought by a requester under this section when the records are not in the possession of the agency, the requester shall join the person having possession of the records, and the court shall also have jurisdiction to order the return of the records to the agency."

EXPLANATION

This proposal, when read in conjunction with the definition of "records" proposed elsewhere in this statement, would overrule the 1980 Supreme Court decision in Kissinger v. Reporters' Committee for Freedom of the Press, 445 U.S. 136, in which plaintiffs alleged that Mr. Kissinger wrongfully deeded to the Library of Congress certain State Department records which had been requested under the FOIA. Two lower courts ordered the State Department to recover the requested records, but the Supreme Court reversed on the ground that such records could only be recovered by the Attorney General under the Federal Records Act. See 44 U.S.C. § 2905, 3106. As a result of Kissinger, agency officials can deny access to records under the FOIA by wrongfully removing them from the agency. The changed definition of "record" makes it clear that such records are subject to the Act, and if the agency is not willing to recover such records on its own in order to respond to the request, a requester may join the person in possession of the records in any lawsuit. Similarly, the definition of "records," when read in conjunction with this proposal, would overrule the 1980 Supreme Court decision in Forsham v. Harris, 445 U.S. 169. That case involved test data prepared by a consultant under an HEW contract; the test data formed the basis for a report submitted to HEW and used by the agency to support a proposed rule. The requester sought access to the underlying raw data, but was denied access on the ground that HEW did not have the data in its possession. The definition of "records" makes it clear that such data are subject to the FOIA; this amendment makes it clear that if the agency does not attempt to gain access to such records in order to respond to an FOIA request, the requester may name the person in possession of the records in any lawsuit brought to obtain access.

BANKING EXEMPTION

Section 552(b)(8) of title 5, United States Code, is amended by inserting before the semicolon the following: "but only to the extent that production would disclose information on the financial safety and soundness of such financial institutions."

EXPLANATION

When Congress adopted this exemption in 1966, its intent was to exempt from disclosure those audits, examinations and other records which reflected on the financial soundness and safety of banks and other financial institutions. Since 1966, however, Congress has imposed new obligations on the banking industry, and audits now extend not just to financial soundness, but also to compliance with the Truth-in-Lending Act, the Fair Credit Billing Act and other similar statutes. However, courts have read this exemption as so broad and all-inclusive that such information -- which has no bearing on whether a bank is financially sound -- is barred from public view. See Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980).

There is no excuse for denying the public access to such information as which banks are improperly denying credit to women and minorities or which banks are overcharging their customers in violation of the Truth-in-Lending Act. This amendment would narrow the broad reading which courts have given to exemption 8 and bring it more in line with what Congress intended in 1966.

SANCTIONS

The first sentence of section 552(a)(4)(G) of title 5, United States Code, as redesignated [now section 552(a)(4)(F)], is amended by striking "Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the Court additionally issues" and inserting in lieu thereof "In any case

brought under this section in which the complainant substantially prevails, the court may issue".

EXPLANATION

The sanctions provision of the FOIA was included in the 1974 amendments to instill a notion of individual accountability for wrongful withholding. However, the provision has been interpreted to apply only where (1) a requester has "substantially prevailed"; (2) a court has ordered production of the requested records and made a written finding that the circumstances surrounding the withholding may warrant sanctions; and (3) the court awards attorneys' fees. Emery v. Laise, 421 F. Supp. 91 (D.D.C. 1976), aff'd, D.C. Cir. No. 76-1973 (Oct. 26, 1977). Thus, even when an agency's withholding is particularly egregious (e.g., it has no basis in law) and plaintiffs eventually obtain access to the requested records without a court order, the agency official responsible for the withholding is immune from sanctions. Similarly, sanctions are not available if attorneys' fees are not sought or if the requester is a for-profit corporation and thus not eligible for fees under the circumstances.

This amendment seeks to bring the provision into line with the statutory purpose for which it was enacted. The amendment does not change the substantive test as to when sanctions may be imposed, only the trigger, i.e., a party would be required only to "substantially prevail" in order to allow a court to impose sanctions. This amendment will reduce agency incentive to withhold records improperly, thus improving the functioning of the Act.

INTEREST

Section 552(a)(4)(G) (as redesignated) [now section 552(a)(4)(F)] is amended by adding at the end thereof the following:

"Notwithstanding any other provision of law, interest shall be allowed on any such judgment from the date the judg-

ment was entered until a date not more than 30 days preceding the date on which the judgment is paid at the rate established by the Secretary of the Treasury in accordance with section 6621 of title 26, United States Code, which is in effect on the date of payment."

EXPLANATION

This proposed amendment is designed to clarify that recipients of attorneys fee awards under the FOIA are entitled to recover interest to the same extent that interst may be assessed on other money judgments imposed by federal courtss and to overrule the contrary judicial opinion in Holly v. Chasen, 639 F.2d 795 (D.C. Cir.), cert. denied, ___ U.S. ___ (U.S. 5 Oct. 1981). The interest rates to be used are those used in judgments in tax cases. Under 26 U.S.C. § 6621, the Secretary of the Treasury each year determines a rate at which interest awards will be set, and this figure is pegged to the prime rate. This procedure serves two purposes: it ensures that awards of interest are in line with the current market rate and avoids litigating over the interest rate in effect in any given year.

GAO STUDIES

We propose the following GAO studies of what we perceive as two chronic problems with administration of the FOIA. Both are intended to focus on ways to streamline processing of FOIA requests and to make administration of the Act more cost-effective.

Within two years after the effective date of this Act, the Comptroller General of the United States shall report to Congress and make recommendations on

(1) methods which can be used by agencies to improve, streamline and reduce the cost and time of processing requests for production of records under this section,

including (a) methods to reduce the number of personnel used to process requests and administrative appeals, (b) methods to improve agency recordkeeping so that requests can be processed mroe quickly and efficiently, (c) methods to ensure the expedition of requests which deal with subjects of immediate public concern or are simple to process, and (d) whether the federal financial accounting system creates disincentives for agencies to waive fees.

(2) the cost-effectiveness of the Department of Justice's policy to oppose requests for attorneys' fees in cases where the requester has obtained the documents sought, including a comparison of the amount of money saved by successful opposition to proposed fees with the amount of additional fees assessed against the United States as a result of the proposed attorneys' fees and the cost to the Department of conducting such litigation.

EXPLANATION

This section attempts to deal with two chronic problems which impede smooth functioning of the FOIA. Some agencies do not keep records in a manner which facilitates prompt location of requested material, and GAO would be directed to study current procedures and recommend ways agencies can improve their recordkeeping and thus their responsiveness to FOIA requests.

The second study deals with a problem common in FOIA litigation: the Justice Department's opposition to attorneys' fee proposals. Opposition requires the parties to litigate that issue, and it is unclear whether this policy is cost-effective. GAO would be directed to find whether the amount of money saved by this policy is greater than the additional money paid and costs incurred as a result of additional litigation and to make appropriate recommendations.

JAMES T. O'REILLY
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CINCINNATI, OHIO [redacted]
[redacted]
[redacted]

December 22, 1981

Senator Orrin Hatch
Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
Washington DC 20510

Re: S. 1730/Freedom of Information Hearings

Dear Senator Hatch:

Your Subcommittee was kind enough to consider testimony by several witnesses, including myself, in July of this year, regarding the business confidential data provisions of the Freedom of Information Act.

Subsequent to that appearance, on November 12 your Subcommittee received a very detailed and comprehensive rebuttal statement by Mr. Adler and others which in part took issue with the positions which had been presented in our July appearance.

If the record of the Subcommittee hearings will permit, I would like to provide for the record a brief personal response to the Adler paper of November 12th. I regret that it has taken me some time to prepare this reply, but if possible I would appreciate its inclusion into the record so that my July remarks and the November rebuttal statement may be read in an appropriately synchronized form, with the November assertions paired with the positions taken in my July presentation.

Thank you for considering this request.

Sincerely,

James T. O'Reilly

att.

COMMENTS ON THE ADLER-HITCHCOCK PAPER

This paper offers comments on the business confidential data provisions of the November 1981 submission, "Joint Statement of Adler, Halperin and Hitchcock on Proposed Amendments to the Freedom of Information Act, before the Subcommittee on the Constitution, November 12, 1981."

The following lists the assertions presented in the paper at pages 29-49, and each is matched with a response:

Assertion 1. There is no evidence of need for substantive change to exemption (b)(4), because most problems are procedural and courts are sensitive to disclosure of genuinely confidential business records (p. 29). Perceptions of problems have never been substantiated (p. 30).

Response 1. The substantive change recommended enhances predictability. People who devote money and time to developing technical and marketing information, as with other investments, have an expectation that the value they expect in return for that investment will be able to be exploited by licensing, by manufacture of an improved product, etc. The FOIA in its present form has created a systemic problem, in that the private sector people who submit their nonpublic information to inspectors or other agency officials cannot predict whether their information will actually be withheld from their competitors, who are perhaps 90% of the requesters of that information from agency files. The "substantial competitive harm" test is a shifting, judicially-created, and judicially-modified standard. The shifting marketplace positions which produce variations in "harm" to "competitive position" are unpredictable. The test, which changes as each new decision evolves, is a moving target. It is the antithesis of a predictable agency action. The outcome of the future legal defense of one's property should not have to be in doubt.

It's true that the publishable cases of secrets being disclosed are relatively few, since the absence of notice and an opportunity to object reduces the number of occasions when a person can tell whether his or her information has been sent to competitors. There are also strong incentives never to "go public" with the fact that one competitor got the information. Doing so is a sure way to get other competitors onto the trail of that information, and could be an admission that the submitter failed to protect itself from governmental misconduct. The Babson College paper speaks to that issue.

So the cases which can be publicly explained are fewer than the total number of disclosure incidents. The systemic problem, however, cuts back on cooperation with government and introduces significant negatives into government -- private sector communications. At the input end of government's information line, agencies are less likely to receive full cooperation because of serious concerns with information output problems.

Assertion 2. Wording of the exemption proposal allows withholding even if there is a public interest in disclosure and even if there is no adverse effect on competitive position (p. 29).

Response 2. The subcommittee bill's exemption challenges the notion that an artificial proof of abstract "competitive position" displacement is required. The process of proving that adverse effect is a cumbersome burden which should be relieved. The focus should be on impairment of a legitimate interest. Under the new standard, there will frequently be adverse effects on competitive position, but the definite establishment of such effects will not be an absolute prerequisite to protection. Rather, the expectation of continued confidentiality will be protected, where it is legitimately expected. And where the public interest in disclosure consists of more than the usual incentives -- curiousity and commercial avarice -- then the overriding nature of the public interest may lead to disclosure even though a legitimate private interest exists.

Assertion 3. The subjective standard proposed gives undue deference to wishes of submitter.

Response 3. This allegation misses an important point: whose information is it anyway? The private sector person was not paid by the government for the delivery of that information, as a government employee or consultant or contractor may be. The "wishes" of the submitter are basic privacy rights, not just arbitrary desires for silence. The desire to protect property in which one has invested money is not an "undue" concern. Rather, it can often be asserted that the submitter is the only one who really has rights that can be asserted, or to whose expertise deference can be given. An agency will sometimes want to protect private data, but for the most part it is the desire of the private person to protect legitimate privacy rights that should be aired in an exemption (b)(4) situation. Safeguards are built into the system to screen out the illegitimate conduct that should not be shielded from public oversight. But in this FOIA exemption, unlike others, the private right is the proper focus of attention.

Assertion 4. Procedural reforms would give substantive rights to submitters (p. 30).

Response 4. This is unfortunately incorrect. Substantive rights do not flow from procedures alone. This same argument was made in several recent statutes in which Congress addressed identical issues. In the cases of FTC documents, CPSC material, Shippers Export Declarations, tax return data, and the like, Congress has chosen not to stop at pre-disclosure notice provisions, but has provided assurance through substantive amendments that real protection would be provided to the private information.

For the submitter, the prospect of being told that there is a right to file paper objections -- with an agency which had already made up its mind that harm is not "substantial" -- is not very comforting. The agency still is handicapped by the awkward demands of identifying relative market position and the relative harm which would be created to that position by virtue of disclosure. Substantive change is an important aspect of the correction which our system of business disclosure needs.

Assertion 5. Procedural reforms would go a long way to alleviating specific concerns expressed, as well as any perception problems (p. 30).

Response 5. True. They would go a long way, but not far enough for predictable outcomes. The disagreement is over the degree to which procedural reforms are sufficient. The standard which the judge (who is the ultimate decision maker) will apply ought to be a balance. What the public needs, in order to have access to government's workings is balanced with what the private person needs, in order to not suffer an unreasonable loss merely by the temporary possession of its valuable information to the government. The accountability information for which the FOIA is designed must be available; private rights ought to be respected. Notice and dialogue opportunities do not change the complexity and uncertainty of the substantive standard. That standard needs to be reconsidered.

Assertion 6. No explanation is given of what information now released would be kept confidential; need specific examples.

Response 6. The panoply of reports filed with government makes such a catalog impossible. The economists who provided the only expert input to both the House and Senate hearings testified that circumstantially relevant business information is very important in its context. To cite a few examples which the current test fails to adequately cover, but which the proposal covers:

a. Assume that prices for specialized equipment are negotiated privately by a supplier who sells to two firms which are not competitors. It is likely that the acquisition price of those capital goods by a concrete block firm operating on the West Coast may be withheld under the proposed test, but not under the current one. Assume government files contain the West Coast firm's price data. The better negotiation skills of the West Coast firm reflect a lower price for the supplier's equipment than had been paid bythe requester, a Florida block firm. The two firms do not compete so no competitive position of the West Coast firm is affected.

But the piece of information could show a special way for others to negotiate in the future, with that capital goods supplier. The supplier may lose in its future competitive positions, from disclosure of its customer's files, but an agency acquiring the information from the submitting firm may not care to consider harms to persons other than the agency's own submitter. The proposal protects "any" person's legitimate commercial interest, absent a public interest disclosure rationale.

b. A potential buyer of a small business may want information about the privately-held firm which does not affect its competition's dealings but which reduces the purchase offer that the potential buyer might make. No effect on competitive position is provable, but actual commercial harm is actually done by leaking information that would otherwise have to be negotiated in the private purchase transaction.

c. Identities of individual members of a successful and unpublished scientific research project would aid competitors in identifying likely targets for "headhunter" recruitment. Luring away a top scientist may not be "substantial" competitive harm, but it is an incremental disadvantage to the owner/employer who trained and relied on that worker, a disadvantage which cumulatively aids competitive firms in that line of research. There is a legitimate business interest in reduction of such raiding.

Assertion 7. Courts have uniformly given protection to genuinely sensitive commercial information. Few have rejected (b)(4) exemption claims (p. 31).

Response 7. It is heartening that so many courts have been realistic in protecting commercial confidential data when owners have sued the agencies to forestall disclosure. After extensive presentations, arguments, witnesses in some cases, etc., the courts have most frequently sided with the owner and against the agency. That raises the question why the agency defendants should be spending money to disclose the private information at all. It would be superior for the public to have access in cases of overriding public need, and for private persons in all other cases to have the benefit of the expectation of privacy. There should not have to be an expensive trial for the protection of confidential data; the law should operate as it does in the commercial sector litigation context, to protect that information routinely.

Assertion 8. Regarding the term "Research," there is no objection to treatment of noncommercial data, but all research is too broad and should not be covered (p. 32).

Response 8. Legislative history can resolve this concern by demonstrating the intention to override the noncommercial exclusion of the footnote in the Washington Research Project case, 504 F.2d 238,244 n.6.

Assertion 9. "Other commercially valuable information" is too vague (p. 33).

Response 9. Yes. This was dropped in the Subcommittee draft.

Assertion 10. Copyright protection is not properly done via this exemption.

Response 10. This can be conceded.

Assertion 11. Current judicial standards requiring proof of substantial competitive harm are an objective examination of the degree to which substantial competitive harm would flow from disclosure. The proposed alternative allows a purely subjective claim, possibly based on nothing more than the fear that disclosure would risk embarrassment to the company (p. 34).

Response 11. The first part of this assertion assumes that judicial review should treat the interests at issue in all FOIA requested documents . alike, and that objectivity in the measurement of exemption is universally appropriate. But the private data submitted to an agency is not the same as FOIA-covered governmental data. A requester's interest vis-a-vis another private party who was the submitter is different from government memos, and is

often not capable of easy generalization. The value of the document is often in its special circumstances. The Babson College economists in the Subcommittee hearings called this value the knowledge of specific circumstances which have meaning in the context of a particular business, but may not in the global sense serve as a source of quantifiable competitive displacement.

The second part is also incorrect. Mere embarrassment to a company in a public relations sense is not enough to serve as a basis for withholding. The basis must be a legitimate interest. That interest must be impaired. If there was no reasonable linkage to the business operations of the firm, e.g. the embarrassment carries no reasonable expectation of a loss of sales as a result of publicity about that firm, then the firm would not be able to make the confidentiality claim. However, there are instances where embarrassment can be a partial effect besides the more dominant effect of direct loss of sales. In the CPSC television fire allegation cases, two of which got to the Supreme Court, a manufacturer who kept records of unsubstantiated allegations that its television was "involved" in fires sued to block CPSC disclosure of the grossly misleading reports, and won. The distorted impression that the manufacturer who kept good records had more fires than the manufacturer who routinely discarded such unsubstantiated complaints, would have been both embarrassing and commercially harmful, because of the fire allegation's impact on marketability of televisions. In the Worthington Compressors case, decided in the D.C. Circuit in mid-1981, the potential that the competitor who made the FOI request could distort and misuse test results on the manufacturer's products was the kind of harm that the court said might be cognizable under the FOIA. So plain embarrassment is not protectable; under both current and proposed law, the kind of trade disparagement which accompanies serious commercial discrediting of the firm's products is cognizable harm.

Assertion 12. The proposal lets a submitter define confidentiality on submitter's own terms (p. 34).

Response 12. As discussed above, the classes of information which merit protection are listed, and a legitimacy test is applied. Confidentiality is defined by class of interest, not by a hypothetical consequential effect upon market shares. Indeed, one could say that the present "substantiality" test lets an agency define the key term of confidential status on its own terms, not on the terms that would be used by people experienced in the marketplace. For example, a biologist employed by OSHA could be making a disclosure decision about the competitive marketplace in steel processing machinery. If there had to be an "objectivity," it would be far better to have the one with actual market knowledge making the objective determination.

Assertion 13. Harm to any person, not just submitter, would be considered, and it should not be.

Response 13. Yes, harm to third persons should be considered, especially where the agency obtained information from one part of the supplier-customer, distributor-manufacturer pair. The real party in interest ought to be considered here; if a trucking line gave the Customs Service information which it in turn obtained from one of five hotly competitive makers of new equipment, it is the equipment firm rather than the truck line that has the real interest in confidential treatment. Federal civil procedure protects the real party in interest, and this protective system should also.

Assertion 14. The term "may" is much looser than "likely" in defining the causation of harm test (p. 34).

Response 14. Yes, and that was tightened with substitution of the word "could."

Assertion 15. More uncertainty and more litigation would flow from the new test (p. 35).

Response 15. No. Fewer business requests will mean more time for an agency to pay close attention to public interest requests. Commercial requests will decrease significantly as agencies focus on public interests in disclosure.

Those suits which are contested will be fought predominantly between the informed submitter and the interested requester, with the agency having less of a direct involvement than under current law, in which the agency is the principal defendant.

Assertion 16. The new test would shield from the public any information that reflects adversely on a corporation's product or activities. No justification exists for broad withholding, short of public relations concerns. There is a need for information to be disclosed so that the public can see if an agency is acting in best interests of public (p. 35).

Response 16. No, as discussed above, public embarrassment alone is not sufficient. Yes, the accountability will be improved; to monitor whether the agency is acting in the public interest, there is no barrier to disclosure of agency's own monitoring data. If collusion or misfeasance existed, there would not be a legitimate withholding. And finally there is no inhibition to IG or GAO or other audit reports being released.

Assertion 17. Tests of legitimacy and impairment are so porous that new litigation will produce more uncertainty. (p. 36)

Response 17. No. Higher thresholds for disclosure of private records under the public interest test will mean fewer such requests. Better quality of processing will be provided for those that do have a public purpose. If precision in exemptions were the measure, the term "confidential" in the 1965-66 FOIA was so porous that courts struggled with it down the path of market share analysis. But agencies should not have to expect a Sears catalog of classes of protectable information; the responsible legislative change is to make the changes proposed here and then put a reasonable legislative history together.

Assertion 18. "Legitimate" attaches to the wrong feature, the business interest may be legitimate while the conduct is not. Agrees with thrust of amendment but not its presentation (p. 36).

Response 18. An interest it illegitimate if the motivation or rationale is not a legitimate one. This objection may be a merely semantic one, and alternative ways of similarly excluding improper conduct should be considered.

Assertion 19. Cut notice time to 5 days from 10 days in procedures section of the proposed bill (p. 37).

Response 19. This assertion suggests that all submitters reside within four or five days' mailing distance of agencies' Washington mail rooms. That is patently incorrect. If we are to encourage thoughtfulness and decrease the rapid litigation practices which the commenters disdain, we should give a reasonable notice and reflection period attuned to submitters in Topeka, Salt Lake City or Greenville who have to wait for the agency decision before deciding on their own course of action.

Assertion 20. Here there is no risk of agency error once there is notice (p. 38, line 2).

Response 20. This is hard to believe, if the commenters simultaneously accept that agencies make mistakes in disclosing confidential business data (p. 30, line 8). There continues to be the risk of release, advertent or inadvertent. For example, in the Consumers Union v. Board of Governors of Federal Reserve case, an agency employee knowing that the FOI request had been denied printed out the confidential loan information on an agency computer terminal and delivered it to the FOI requesting organization, with which the employee had sympathy. The employee was discharged but not prosecuted. In other cases, exempt material has been inadvertently disclosed. Such mistakes make it impossible to rely upon mere procedural notification steps.

Assertion 21. The bill should cut response time for submitters to 5 days from 10 days.

Response 21. As with Response 19, mailing time is just part of the time needed to make and substantiate a credible decision; if the mails take longer than 5 days from the agency's outgoing mail room in Washington to the submitter's in-box in Topeka, Salt Lake City or Greenville, then the submitter cannot be expected to generate a quality response. This suggestion betrays an expectation that submitters, like many requesters, are native to the Washington area. That simply is not the case, and that erroneous assumption could make FOI decisions unfairly stacked against the residents of 50 states outside the D.C. area.

Assertion 22. In some cases no notice should be required of the agency, e.g. where disclosure is barred by another statute.

Response 22. Yes, see section 552(a)(7)(B)(ii).

Assertion 23. Commenter strongly opposes ex parte oral hearing. Submitter should be able to state objections in writing. Enormous burden on agency, especially for non-Washington hearings. Questions exist about this procedure for informal hearing and creation of a "record." Delay without improved decision making would result. Phone contact is sufficient (p. 38).

Response 23. Oral hearings are moved in S. 1730 as amended to agency discretion, with primary emphasis on written objections. This is a significant concession, and meets the objection in ways that leave the agency with a lot more discretion.

Assertion 24. Cut agency decision time to 10 from 30 days after comments are received (p. 38).

Response 24. If the commenters want the agency to have a reviewable record, it should be a good decisional record. The folly of expecting rapid and thoughtful decisions under the 10-day provision for response to requests should demonstrate that this proposed 10-day rule is likewise unreasonable.

Assertion 25. The bill should combine a ten-day hold period after agency's decision to release, with a special venue provision that aids the requester's desire for venue in requester's district, so that the requester can sue first (p. 40).

Response 25. While requesters quite understandably want to sue first so they can get awards of fees and costs, it makes no sense to put a small business person, or any submitter with witnesses and records in one district such as Oregon or Florida, to the expense of defending a case in New York or Washington. The assumption is implicit in that assertion that all submitters are wealthy enough to litigate anywhere, and all requesters are impoverished. Yet the vast bulk of requests are by domestic and foreign competitors and their agents. Note that the venue transfer item (page 42) is transfer to a district where the requester could have brought suit -- so the requester need not start any action in New York, but can merely have the case moved there automatically from the West or South on motion of the requester. That disadvantages the submitter, particularly the small business person, and denies the locality the opportunity to have its controversies resolved locally.

Assertion 26. Commenter opposes 90 day statute of limitations for disclosure suits.

Response 26. Agreed. Extended to 180 days.

Assertion 27. No objection to statutory cause of action.

Response 27. Agree.

Assertion 28. Congress should refuse de novo review to submitter; it should retain de novo review for requester. The agency process here creates a "record" by paper submission which should be reviewable only on an arbitrary or capricious standard (p. 41).

Response 28. De novo review for all FOI Act disclosure decisions makes eminent sense. Congress had made a conscious choice to have de novo review, to prevent review "from becoming meaningless judicial sanctioning of agency discretion," as the original 1965 Senate Report justified it. The choice works both ways with de novo review in many of the reverse-disclosure cases already decided. Property rights are at issue; loss of property would be final if the disclosure occurred. A careful record provides due process protection. When objections are considered rapidly, in written form (with oral presentations in the agency's discretion, see section 4), the record is very sparse. It makes sense to have a rapid decision at the agency level paired with a record assembled de novo at the district court. It also would be contrary to APA notions of fairness and due process to cut off a right to a consideration on the merits when the agency consideration is purposely intended to be so perfunctory.

Assertion 29. The requester is excluded from the record creating process (p. 41, line 21).

Response 29. The subcommittee bill affords the requester an opportunity for participation in the decision. The requester gets notice of the objection and of the agency decision. The submitter and requester have equal rights to request oral conferences with the agency to maketheir arguments. The agency will consider the requester's comments. The submitter reasonably expects that a full, candid presentation can be made to the agency, without sacrificing the sensitive information during the course of that information's defense. But amended subsection 552(a)(7) gives the requester an opportunity to be heard. It is incorrect to assert that the requester is excluded from the process.

Assertion 30. The comment asks that transfer of cases to requester's district, automatically at requester's option (p. 42).

Response 30. Please see Response 25.

Assertion 31. Requesters should receive payment of their litigation fees from the submitters of private data (p. 42, line 25).

Response 31. No, the submitter who defends property rights should not have to endure both loss of value and payment of the person who took that valuable property. The purpose of the primary American Rule on attorneys' fees is to discourage unnecessary litigation. Exceptions are read narrowly. The exception for agency payment of fees of successful requesters is founded on an assumption of vindication of a public right against public officials. The private information owner is not within the same rationale. The private owner should not be taxed for the benefit of another private party seeking its information. For example, in the Worthington Compressors case in which the requester was Sullair Compressors, Sullair was not entitled to attorneys' fees. None of the courts which have addressed this question have made such awards to date, and no change in the law is needed.

Senator HATCH. I would now like to call on Prof. Anna K. Nelson of the Organization of American Historians.

Again, we apologize to you for taking so long, but this is one of those very fascinating hearings that do take some time.

Ms. Nelson, I have about 7 minutes.

Ms. NELSON. That will be all right. We were told originally we would have no more than 5, so we are very well prepared.

Senator HATCH. Let me ask if Prof. Antonine Scalia is here?

Mr. SCALIA. Yes, sir.

Senator HATCH. I do not know if we can finish both witnesses before I have to go to vote. It is important that we make this record, that we get your statement in the record, and that we work with you and submit questions to you.

Ms. NELSON. Shall I proceed?

Senator HATCH. Let us do this: Let us finish with you, and then I will come back after the vote to hear from Professor Scalia. If we do not finish with you, then I will come back for both of you.

STATEMENT OF PROF. ANNA K. NELSON, ORGANIZATION OF AMERICAN HISTORIANS

Ms. NELSON. The Organization of American Historians, for those of you who are unfamiliar with it, is the principal historical organization devoted to the study of the history of the United States, so we are particularly interested in this act.

Our membership of approximately 9,000 includes professors of history at the Nation's colleges and universities, government historians, archivists, manuscript curators, those who practice history in the public arena, and citizens devoted to studying this Nation's past.

We are very pleased to be testifying today. Historians and other scholars represent the smallest number of users of the Freedom of Information Act, and therefore the importance of accessible evidence for historians is often overlooked. I believe that the Organization of American Historians is the first learned society to testify at these hearings.

As we will give a much longer written statement for the record, our concern today will center on two revisions of the Freedom of Information Act which appear in the legislation before this subcommittee, on which we differ with all of the groups who preceded us today.

First, we are deeply concerned about the amendments relating to fees for users. Both bills before this subcommittee seek to differentiate between information obtained for commercial use and that obtained for the public interest. The bill introduced by you, Senator Hatch, is more precise in its attempt to safeguard the public interest, and we applaud this concern.

Under your provisions, agencies may waive or reduce the fees charged to users of this act if doing so "meets a substantial public interest." Then there are rules for determining the public interest, such as the needs of indigent persons and the fact that the information requested might clearly and substantially benefit public health or safety. There may be no doubt in the minds of historians that their research will substantially serve the public interest, but

there is no assurance that agency Freedom of Information Act administrators will agree with them.

Under the best of circumstances, it will be very difficult for historians to prove to agency personnel that their research would substantially serve the public interest. Whereas a journalist seeks a document for next week's exposé or a public interest group for the protection of public health, the historian may be seeking information for a publication which will take 2 or 3 years to complete.

Therefore, we are very concerned that the amendments proposed here do not adequately protect historians and other scholars, even though these people have neither the resources to pay excessive fees nor the intent to commercially profit from their requests.

It should be made clear in any legislation that distinguishes between users that the research necessary for understanding this Nation's past is definitely in the public interest. Historians should not be subject to the whims of the individual agencies so that an individual administrator might decide that one historian's research met that criterion while another's did not. Indeed, we would recommend that a more equitable way to assess fees would be to simply distinguish between the commercial users of the act and other users.

Second, we are very concerned with the amendments relating to the time for agency response for requests, which is in the administration, not your bill. Amendments in that bill would distinguish between those who demonstrate a compelling need for expedited access and whose requests would primarily benefit the general public and others.

In many agencies, Freedom of Information staffs have traditionally been inadequate, and historians have often found themselves waiting months or even years for the documents or the groups of documents they need to complete research. With severe budget and personnel cuts in the offing, we can expect Freedom of Information personnel to be cut even further.

Under the terms of this amendment, the truncated staffs would clearly be compelled to place the requests of historians and scholars on the back burner while expediting access to journalistic public interest groups.

I would like to emphasize today that while historians may be more interested in the recent past than tomorrow's news, they too work on tight schedules. Often they have no more than a few months to complete research on a university sabbatical, meet a deadline for a publisher, or present a scholarly paper. The inequities of privileged access which historians have always opposed, and which this amendment promotes, could prove to be as detrimental to the understanding of our recent past as the excessive fees facing historians with limited resources.

In conclusion, we wish to reiterate our support for the Freedom of Information Act and for the principles of open access for which it stands. As historians, we are keenly aware of a point you carefully noted in your own remarks Senator, when you introduced S. 1730 on October 7—Congressional Record S11297—namely, the idea that "the public interest in open access to information about the Government began with the Founding Fathers."

The Freedom of Information Act is not a primary tool of research for historians: We have not been aggressive users of the act, because the nature of historical evidence is different from that sought by journalists and lawyers. Whereas they often seek the exceptional document or precise report, we seek aggregate groups of data, from which we generalize.

It is often very difficult for historians to use the Freedom of Information Act. Others, for example, seek information from current files; we are more concerned with the recent past—the events of 5 years ago or 25 years ago. Nevertheless, the act itself and the example it has set for other groups of public records has greatly enhanced our understanding of events around us.

We live in a period of such rapid change that it becomes increasingly important to continue to seriously reexamine the recent past. A growing number of American historians have turned to cotemporary history. The access provisions of the Freedom of Information Act and access to Presidential materials which followed has vastly improved our understanding of our system of government, our national security interests, and our role as a world power since World War II.

We urge you to withstand the pressure of those agencies who wish to withdraw their documents from the act and to limit your amendments, please, to those which ensure its proper administration while establishing equitable rules for all of us.

Senator HATCH. Thank you so much. We appreciate your testimony.

[The prepared statement of the Organization of American Historians follows:]

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November 18, 1981

ADDITIONAL TESTIMONY

BY JOAN HOFF-WILSON, EXECUTIVE SECRETARY

ORGANIZATION OF AMERICAN HISTORIANS

On two previous occasions I have appeared before Congress at hearings to amend the Freedom of Information Act. Each time I have stressed the importance of the FOIA for scholars in general and historians in particular. Even though they are far from the most numerous users of the act, scholars are ultimately the most important ones because they interpret for posterity government actions and decisions.

In this supplementary written testimony I should like to comment specifically on the two pieces of legislation before the Senate (S. 1751 and S. 1730) in terms of their potentially negative impact on historical and other scholarly use of the FOIA. Underlying all my remarks is a basic assumption about the nature of historical evidence.

Historians are interested primarily in aggregate declassification of documents because, unlike journalists and lawyers, they are attempting to prove the rule or generalization not the exception. There is, in other words, a very basic difference between using the FOIA to "atomize" a body of material to find a trade secret, to prove the exception in making a legal argument, or to make newspaper headlines and extrapolating from many specific examples. Often, it takes not only a few days or months to amass sufficient historical evidence to prove a particular point, but in some cases it takes years.

Given their approach of evidence, historians have not exaggerated the importance of the FOIA for scholarly research, or misused it for commercial or personal gain. Yet, some of

the provisions in both Senator Hatch's (S.1730) and the Administration's (S.1751) bills threaten the very essence of historical research. Fortunately, timely changes can improve both bills, especially S.1730. Had historians or representatives of learned societies been consulted or allowed to testify before the last scheduled hearing on the Senate Judiciary Subcommittee on the Constitution on November 12, these oversights in both Senate bills very probably could have been avoided.

Analysis of Bills S.1751 and S.1730

Fees: Both S.1751 and S.1730 substantially increase cost to users by permitting agencies to charge for all costs, including the cost of searching for, reviewing, deleting, and duplicating requested records. Moreover, S.1751 raises the possibility of waving fees not only based on consideration of royalties, which is subject to caprious interpretation for a scholarly work if journalistic or commercial standards are employed, but also on "any public interest served by its disclosure." The word "any" is simply too ambigious as far as scholarly works are concerned. S.1730 is much more thoughtfully drafted on the relationship of public interest to costs but errs in the opposite direction by indicating that fees may be reduced or eliminated if such action "meets substantial public interest because furnishing the information can be considered as primarily benefiting the general public. . . [or] the likelihood of dissemination to the public of significant information clearly and substantially benefiting public health or safety." Substituting the underscored words "substantial" and "significant" for "any" only makes the position of the scholar more problematic in the face of agency personnel who will be in a powerful position to decide which historical research fits this wording. Historians seldom rush to press in the manner of journalists, lawyers and sensationalizers and therefore it is often more difficult for them to convince FOIA processors of the public interest of their FOIA requests.

Recommendations: Both bills should either simply distinguish commercial users from all others (waving all fees for the latter) or at the very least insert wording which would wave all fees for historians and other scholars.

Records: S.1751 defines agency "record" by excluding "documentation created for the personal convenience of any government employee or official." In my previous Congressional testimony on July 16 and October 15, 1981, I explained that one of the reasons that historians favor the broadest possible application of the FOIA stems from a new research methodology which attempts to determine "networks" within public and private bureaucratic structures that have an impact on decision-making processes. The amended definition of "record" in S.1751 would hamper this type of research by preventing the release of invaluable appointment and chronological diaries or journals, research notes developed for decision making, and in-house memoranda relative to decision-making processes. S.1730 contains no such restrictive wording.

Recommendation: Elimination of this addition in S.1751 to SEC. 9 paragraph (6) of Section 552(e) of title 5, U.S.C.

Time Limits: S.1751 is also more restrictive than S.1730 because it triples the amount of time agencies are now permitting in response to FOIA requests. Furthermore, S.1751 is potentially more harmful to requests from scholars because it gives the agency discretionary power to grant priority to "a requester who demonstrates a compelling need for expedited access to records and whose request for information will primarily benefit the general public. . . ." My work at the National Archives on the Nixon papers has clearly indicated that journalists and lawyers already receive preferential treatment compared with historians and this wording would only serve to institutionalize an already inequitable practice.

Recommendation: Eliminate this amended wording from SEC. 6 paragraph (6) of section 552 (a) of title 5, of U.S.C.

Intelligence Exemptions: S.1751 substantially reduces access to the records of the FBI, CIA, and other investigatory agencies by permitting the Attorney General to authorize the withholding of whole categories of information relating to terrorism, foreign counterintelligence, and organized crime. It also permits the withholding of information relating to on-going investigations, regardless of whether release would interfere with such investigations. S.1730 would exempt many FBI records from coverage of the FOI Act. The Hatch bill would exempt all records -- whether they are investigatory records or records merely "compiled for law enforcement purposes" and in any way "used" for law enforcement purposes. In addition to this double-barreled loophole (the first condition of Exemption 7), the Hatch bill expands the scope of the current exemption from identities of confidential sources to anything which would tend to disclose -- a confidential source.

As unfortunate as these intelligence exemption sections are in both bills, they do not represent the worst type of "back-door" amendments currently circulating on the Hill. Passed as "riders" on appropriation authorizations and other bills, these usually propose to amend the National Security Act of 1947 or the Central Intelligence Act of 1949, rather than the FOIA itself. In the October OAH Newsletter it was pointed out that it is also possible to

> "amend" FOIA indirectly by passage of a statute which specifically authorizes withholding of certain information and can be invoked as a "(b) (3) statute" pursuant to FOIA's third exemption category. Such legislation is generally referred to the committees that have jurisdiction over the agency involved, rather than to the FOIA over-sight committees.

Recommendation: No further exemptions for any intelligence or other agencies through either S.1751 or S.1730 or amendments or new "(b) 3 statutes" in authorization legislation. The fact remains that the FBI has not publicly proven a single informant had his or her personal security jeopardized because of an FOIA court decision.

National Security: Both bills extend the ease with which agencies can hide behind the rubric of "national security". In particular, S.1751 drastically limits judicial review of agency withholding information on national security grounds, while S.1730 allows for a blanket exemption by an "agency conducting a lawful national security intelligence investigation."

Recommendation: Recognition that the national security is not best served in a democracy when indiscriminately protected by covert actions.

In conclusion and on behalf of the approximately 9,000 specialists in American history represented by the Organization of American Historians, I want to suggest most strongly that instead of restricting the use of FOIA by scholars that Congress seriously consider extending the Act to all branches of government. In fact, Assistant Attorney General Jonathan C. Rose suggested before the House Subcommittee on Government Information and Individual Rights Committee on July 15, 1981 that the FOIA should be applied to Congress. As early as 1977, the minority report of the National Study Commission on Records and Documents of the Federal Officials recommended that the FOIA should be extended to all public records of federal officials immediately after they left office while the majority report called for application of the FOIA to the papers of the President, members of Congress and Judges after 15 years.

In the interest of preserving and documenting an accurate record of past and contemporary history, the OAH realizes that the FOIA can never substitute for aggregate declassification of documents, but it could be made a much more useful research tool for scholars if Congress would not continue to lump legitimate scholarly use of the FOIA with others' misuse of it.

Senator HATCH. We have one final witness, and that is Prof. Nino Scalia.

Nino, I am going over to the floor to vote, and I will be right back. If you can wait, we will certainly get your testimony in.

[Recess taken.]

Senator HATCH. Professor Scalia, we are happy you have had so much patience to wait for us. We think that your testimony is going to be very important for this subcommittee's consideration. You are our last distinguished witness this afternoon, and we certainly welcome you from the University of Chicago Law School.

We also note that you are chairman of the American Bar Association's section on administrative law. Formerly you served as Assistant Attorney General for the Office of Legal Counsel of the Department of Justice and chairman of the Administrative Conference to the United States.

We want to thank you as well as our other distinguished witnesses for appearing here today before our subcommittee.

STATEMENT OF PROF. ANTONINE SCALIA, SCHOOL OF LAW, UNIVERSITY OF CHICAGO

Mr. SCALIA. Thank you, Mr. Chairman. I appreciate your continuing the hearing into this late hour. If my testimony were in sufficiently legible form, I would leave it with you, but the only way to convey it is to read it from my notes.

Senator HATCH. We will be happy to hear it.

Mr. SCALIA. Fortunately, I am a New Yorker by birth and upbringing, so I can speak fast.

It is not my intention, Mr. Chairman, to discuss the details of the proposed amendments, but rather to urge upon you the clear need for amendment in several major areas. I should add that I am speaking purely on my own and not as a representative of the American Bar Association's Section on Administrative Law. Their views may well differ, for all I know.

My own experience with the act is not primarily as a requester of information, although as an academic I am certainly a member of one of the groups most benefited by the legislation, nor as a Government official reply to requests, although during my years in government I sometimes did so.

Rather, my primary experience has been as the officer in the Department of Justice whose division was responsible for advising agencies concerning application of the act, encouraging their compliance with it, and preparing the annual reports which the Attorney General is required to make to Congress.

During my period of service in the Department, these were the responsibilities of the Office of Legal Counsel, which I headed. We took those responsibilities seriously. At least I recall that we were usually on the disclosure side of things, arguing with agencies and sometimes with other units within the Department itself against what seemed to us unwarranted claims of exemption.

The first element of my FOIA experience that I wish to share with you is the first element that I myself experienced when I first arrived at the Office of Legal Counsel in September 1974. It is the realization that the 1974 amendments to the Freedom of Informa-

tion Act are a monument to a failure of cooperation in the legislative process between the legislative and executive branches.

The executive had other problems on its mind that summer, as you may recall. President Nixon resigned in August, and the Justice Department itself was in some disarray. As for the Congress, it had a distrust of the executive. It spread down from the President and his immediate advisers to all men and women in any position of responsibility. I recall as long as a year later that all executive officials were placed under oath whenever they testified before a particular House committee.

It was, in short, an era not likely to produce from the executive branch careful presentation nor from the Congress a sympathetic hearing on these matters that touch so proximately upon executive operations.

The executive, as I have heard the history described from those who were involved in the process before I came upon the scene, made a bad situation worse by adamantly resisting at the outset all changes in the act, even those that the Congress was obviously bent upon achieving.

By the time it realized the error of its obstinacy, the train had left the station. The changes had been drafted and negotiated among Congressmen and committees without the degree of executive branch participation that might have made some of the changes, though still to be sure unpalatable, considerably more realistic.

As you know, President Ford vetoed the bill that finally emerged. It took a good deal of courage for a President who had come into office only about 2 months earlier in the circumstances that then obtained, to veto a bill that bore the words "Freedom of Information," and his action was clear indication of the profound misgivings which the executive branch had but had inadequately conveyed to the Congress.

What I hope to suggest by this history is that you may approach the amendment of this legislation with somewhat less deference for your earlier handiwork than is usually justified, and you may plausibly blame the defects, if you wish, upon the executive that now complains of it. It should be apparent that fundamental revision of the Freedom of Information Act is needed by simply comparing what the act was in contemplation with what it has turned out to be in reality.

The act and its amendments were promoted as a means of finding out about the operations of government. They have been used largely as a means of finding out about the operations of private institutions. They were promoted as a boon to the press, the public interest group, the little guy. They have been used, leaving aside Privacy Act requests, very frequently by corporate lawyers.

They were promoted as a minimal imposition upon the operations of Government. The House committee, as I recall, estimated that the 1974 amendments would cost only $100,000. They have been used to turn the Federal Government into the largest library reference service. One request alone, as you have heard testified, costs the taxpayers more than $400,000.

There has grown up since 1974 an entire industry based upon the Freedom of Information Act, a two-volume loose-leaf service, for ex-

ample, updated monthly, that retails at $438 a year. Every week, the Legal Times of Washington runs a full page of notable freedom of information requests filed during the preceding period, many of them requests by corporations finding out about other corporations.

I just learned in discussions before this testimony that there is a society known as the American Society of Access Professionals, which is composed of people who are in the business of freedom of information requesting.

The necessary training for a big-time litigating lawyer includes not only the cross-examination of witnesses but use of the Freedom of Information Act.

In short, it has turned out to be a far cry from just John Q. Public finding out about how his Government works, although John Q. Public is footing the bill for most of it.

When the results diverge so greatly from the expectations, surely it is time to go back to the drawing board. The basic error in the sketch is, I think, easy to identify. It is exemplified in a "Peanuts" cartoon that one of the more philosophical of my children brought to my attention.

A worldly wise and somewhat overbearing Lucy asks the goodhearted and somewhat naive Charlie Brown, "Charlie, what would you rather do, be captain of the baseball team or marry the cute redheaded girl?" And Charlie replies innocently, "Why can't I do both?" to which Lucy responds, "It's the real world, Charlie Brown."

It is indeed. It is a world that imposes choices, even ultimately upon a goodhearted and well-intentioned Government. This message has sunk home in the budgetary field. It is called budget balancing. Even with a printing press at hand, it is not possible to support every desirable program in sight from defense to welfare.

The message has also sunk home in the field of regulation. It is called cost-benefit analysis. Each agency in pursuing its particularly statutory goals cannot disregard the other desirable goals, such as competition, innovation, or simply lower prices to the consumer, which it is thereby impeding.

We must ultimately learn the same lesson, I think, a lesson of the necessity for painful choice with respect to the Freedom of Information Act. The desirable social commodity provided by that legislation, like all others, comes at a cost. Freedom of information is not for free. Responsible government must carefully weigh its costs and decide how much it wants to buy.

I would like to discuss briefly three areas in which, it seems to me and to many others, the necessary choices with respect to freedom of information have not been properly made. The first of these is the area of economic costs.

As I noted above, the 1974 FOIA amendments were estimated to cost about $100,000. They have in fact cost many, many millions of dollars; no one knows precisely how much.

Coming from the University of Chicago, I am permitted to point out that there is no such thing as a free lunch; somebody pays, and in this case it is the taxpayer. That is not necessarily bad; the taxpayer pays for lots of things. But the necessary question is—and this is where the choice comes in—Is all of this expenditure of taxpayer funds worth it, given the other programs from which the

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money is necessarily diverted or withheld? It seems to me almost impossible to say that the answer is yes.

I have always found it remarkable to place side by side, for example, the proposition that we do not reimburse innocent individuals who expend considerable sums in defending against erroneous or even malicious criminal prosecution—to place that side by side with the proposition that we will expend hundreds of thousands of dollars at a shot to respond to the freedom of information requests of an individual who need have no reason for asking for the information beyond mere curiosity. Surely that does not represent a sensible choice.

The free lunch element of the FOIA is significant, not only in that it diverts from the Treasury money that could be used elsewhere; it also brings into the system requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line.

The phenomenon of socially inefficient use of a free good is familiar enough to economists. If the parking spaces around this office building were not rationed, either through the charging of fees or through Government assignment, the people who most need those spaces in order to work here would be crowded out by tourists who might as easily have taken a cab from the hotel. So also would the Freedom of Information Act. I believe that attention to the subsidy element of the act will not only save money but help to solve some of the other problems that result from system overload.

I believe the FOIA would continue to serve its important public service—indeed, in some respect would serve those purposes more effectively—if all requesters were charged the actual cost of finding, processing, and duplicating the material they requested.

There are various reasonable suggestions for exceptions to this "pay as you go" rule, and they are all goodhearted and well-intentioned, as these things usually are. On balance though, I would favor none of them, except a de minimis exception for small requests, as to which it would almost cost more to process the fees than to waive them. There is an exception of this type, I know, in S. 1730.

It is sometimes suggested, however, that an exception should be made to subsidize the requests of impecunious requesters. That is a nice idea, but on balance—and it is a question of choice, Charlie Brown—I think it is much more important to equalize the differences between the rich and the poor in respects more significant than the ability to satisfy one's curiosity concerning material in Government files, other than files pertaining to oneself, which are already covered by the Privacy Act.

It is sometimes suggested that there be, in effect, a bounty of reimbursement for requests that result in disclosures of great public benefit. It is difficult to oppose that suggestion with any vehemence, but in practice I shudder at the political and controversial nature of many of the judgments that would have to be made as to what is publicly beneficial. In principle, I do not like the notion of the Government deciding what is good or what is bad information.

Finally, it is sometimes suggested that special fee arrangements should be made for requesters from the press. That makes some sense, because it is a functionally related exception. The press, as

we generally understand that term, is a group that tends to further in a particularly high degree one of the principal purposes of the act—public disclosure of Government waste and wrongdoing. Moreover, by and large it is a responsible group that already has sufficient disincentive against seeking to comb through masses of marginally useful documents—namely; the waste of its own on-the-job time.

The problem, however, is the difficulty of defining the press so as to include only those who genuinely fit the image I have just painted. Why does it not include anyone who is writing a book, a free-lance magazine artist, anyone who puts out a mimeographed flier, or a trade association journal seeking to obtain information about the competition? I suspect it is the difficulty of arriving at a satisfactory definition of the press more than anything else that has caused us to extend the FOIA subsidy across the board, and I think that is a mistake.

If the only alternative is a universal subsidy, with the expense and the disruption that entails, I think it preferable to rely upon the press' built-in initiative to use the act, even if it is not free—namely; the obtaining of information that leads to increased circulation and sales.

It should be noted, by the way, that this problem of costs is not unrelated to the issue of scope of exemption. If, for example, large classes of files that now account for the bulk of unchargeable processing costs were categorically exempted, both the budgetary and the administrative costs of the processing subsidy would be much less significant. Perhaps we could continue it for everyone. Or, alternatively, denying it to the press would be no major disincentive.

In any case, it seems to me something should be done about the current subsidy system. I recommend eliminating. But if it is to be continued, it is simply not intelligent, in effect, to shovel the money out of a plane to be picked up by the rich and the poor, the public spirited, and the commercially motived, the vitally interested, and the mildly curious alike. If a subsidy is to be applied, one can conceive of many ways to target the subsidy in order to achieve more effectively the purposes of the act. As my discussion above indicates, none of them is perfect, but almost none of them is as bad as the current system.

The second major area in which it seems to me the necessary weighing of choices has not been made is the area of what might be called associational or institutional privacy.

Observers of American democracy since de Tocqueville have noted the vital importance of private associations, corporations, unions, churches, universities, political and social clubs, in preserving freedom by providing diverse centers of power apart from what would otherwise be the all-powerful democratic state. Modern political theorists have reemphasized this concept, referring to such private institutions as mediating structures between the powerless individual and the State.

The Freedom of Information Act in its current form has turned out to be one of many modern factors sapping the vitality of these independent institutions, stripping them to an undue degree of the privacy necessary for their effective operation.

There are, of course, many activities of private associations that should be open to public scrutiny, and Congress has carefully made that judgment in enacting the disclosure provisions of such laws as the Securities Exchange Act, the Bank Holding Company Act, and the National Labor Relations Act.

Of course, in addition to those particular activities of private institutions that require public scrutiny, virtually all activities of private institutions may be subjected to governmental scrutiny when the needs of the Government, including the enforcement of the criminal laws, so require. By and large, it has been left to the agencies to determine when governmental scrutiny is appropriate, and the courts have been most liberal in sustaining the agencies' investigative authority.

Perhaps the most significant feature of the 1974 FOIA amendments little observed at the time was the fact that in one fell swoop they virtually eliminated the distinction between public scrutiny and governmental investigation. The effect of eliminating the previous exemption for investigatory records, except in those relatively narrow situations where the investigation would be impaired, was to convert Government requests for information into Government requests for publication. I think that was a fundamental mistake contrary to our whole tradition of respect for the autonomy and, except in specified fields, the privacy of nongovernmental associations.

The Freedom of Information Act, which was supposed to open the workings of Government, has ended up being used, to a substantial degree, to probe the workings of private institutions. I am not concerned here primarily with commercially or financially valuable information that is thus disclosed, although that is part of the same problem. My main concern is with the impairment of that privacy which has been the right of our private institutions and which many of them require in order to function effectively.

The way things now work, the Government may obtain almost anything in the course of an investigation, and once the investigation is completed the public may obtain all that the investigative file contains, unless some specific exemption applies.

It is noteworthy and entirely bizarre that the exemptions applicable to information concerning private institutions do not include any protection of those institutions' deliberate and consultative processes, although such an exemption does exist—namely, the interagency and intraagency memorandum exemption—with respect to the Government itself. In other words, the Freedom of Information Act, which is supposed to lay bare the workings of Government, is in fact more protective of the privacy needs of Government than of our private institutions.

The justification for eliminating the more categorical pre-1974 exemption for investigatory records was that one could not effectively assess an agency's performance without examining the investigative records on the basis of which it acted or failed to act. In my judgment, that justification has not been adequately sustained.

The new availability of investigatory records has been used most extensively to obtain information about private entities, more extensively perhaps than about the operations of the Government itself, which was not supposed to be the object of the exercise.

If the commercial or financial information exemption is expanded, as S. 1730 and the administration bill would propose, the utility of investigatory records for evaluating the operations of Government will be even more questionable. It would seem to me desirable to reconsider the whole thrust of the 1974 amendment therefore and to move toward reestablishing the distinction between Government investigation and public disclosure.

The third and last area I wish to discuss concerns criminal investigatory and national security information. Here again, there is an absolutely inevitable choice between being captain of the team and marrying the cute redheaded girl.

The more narrowly one tries to frame the exemptions, so that as much harmless material as possible will be disclosed, the more likely it becomes that some damaging material will slip through. It is a question of striking the appropriate balance between risk of nondisclosure—or of coverup if you want to put the matter in the worst context—and the risk of compromising criminal investigations or national security.

That the line was not too wisely drawn in 1974 should be clear enough from a couple of examples. The exemption for law enforcement investigatory records sanctions the withholding in certain situations of confidential information, but only if furnished only by the confidential source.

Obviously, any confidential information furnished by a confidential source might serve to identify the source, but the drafters of the 1974 amendments determined that was not enough and that the possibly fatal confidential information could be withheld from the public or from the mob only if the reviewer established, presumably from a review of the entire file, that this confidential information from a confidential source was obtained only from the confidential source and not from anywhere else. That, it seems to me, is an extraordinarily strange weighing of the competing interests, when what rests on the one side may be the life of the informant and on the other simply the general interest in disclosure.

One can conceive of many situations in which the mere fact that the information was available and obtained elsewhere would not protect the identity of the informant. Suppose, for example, that the informant was the only obvious source and that the other source which canceled the exemption is not one which anyone, including the mob, would have expected to have the information.

Another instance of the inadequacy, almost irrationality, of the 1974 effort in this field is the exemption for information which would "endanger the life or physical safety of law enforcement personnel." Why only law enforcement personnel? Why not their spouses and children? Come to think of it, why not anyone, even you and me?

I flipped back to see how we handled that problem in the Attorney General's "Blue Book" on the 1974 amendments which my office had a hand in preparing. We had to say this: "It is unclear whether the phrase 'law enforcement personnel' means that the endangered individual must technically be an employee of the law enforcement organization. Arguably, it does not. It is clear, however, that the language of clause F can not be stretched to protect the

safety of the families of law enforcement personnel or the safety of other persons."

"Nonetheless," we almost say, almost throwing up our hands, "it is safe to proceed on the assumption that Congress did not intend to require the release of any investigatory records which would pose a threat to the life or physical safety of any person. Perhaps clause A 'Interference with Law Enforcement" would be liberally construed to cover a request which involved such a threat." We were making that up of course, but it is an absurdly limited exemption and demonstrative of the inadequate manner in which the balancing was made in 1974.

In the national security field, perhaps the most unreasonable provision is the requirement for de novo judicial review of the fact that information is properly classified. This is absurd enough when one merely considers in the abstract that a judge is being asked to determine, on his own and with the burden of proof on the Government, what is necessary for national security, what will impair our relations with foreign government, et cetera. These are question which the courts will avoid on the basis of the political question doctrine even when they are presented in connection with the most significant civil and criminal litigation. Imagine pushing the courts into this for the purpose of ruling on an FOIA request.

But the provision becomes even more incredible if one compares it with the Foreign Intelligence Surveillance Act of 1978 where, for the much more important purpose of determining whether forever secret electronic surveillance will be allowed, the court is to accept the certification of a high level executive official that the information sought is necessary to the national defense or to the conduct of foreign affairs, unless on its face the certification is absurd.

I suggest that this provision of the FOIA be amended to conform to the approach adopted in the Foreign Intelligence Surveillance Act. The problem of overclassification is essentially the problem of a low level bureaucrat with too many rubber stamps. It is solved adequately enough, and the courts are spared an enormous amount of work for which they are utterly unsuited if a high level official, even a Cabinet secretary if you wish, is required to certify to the court that the classification is proper.

Indeed, this may well be a more effective protection against overclassification than is the uninformed and thus necessarily deferential judicial review of the classification decision. The stamp-happy official, it seems to me, is not likely to bother his secretary with frivolous classification certification requests very often.

To conclude, Mr. Chairman, with a point which I raised at the beginning of this presentation and which I mean to be the theme of my remarks, the FOIA amendments of 1974, for some very understandable reasons, went too far. They were among many statutes and even more rules adopted during that time which, in the well-intentioned enthusiasm to achieve one desirable goal, lost sight of others.

The process of so-called deregulation which we are now going through consists largely of adjusting such distortions, not of abandoning earlier objectives but of reconciling them with new or long-forgotten ones, and revision of the FOIA, it seems to me, should be part of that process.

Thank you.

Senator HATCH. Thank you.

Professor Scalia, one of the major battlegrounds under FOIA has been the court review of classified material. You have discussed that with us today. You were at Justice in 1974 when the FOIA amendments were enacted which essentially repealed the *EPA* v. *Mink* decision of the Supreme Court. *Mink,* as you will remember, said that the courts may not review records to see if they were correctly classified. The 1974 act changed that. What rules should the courts have in reviewing classified information, and how can we resolve this problem?

Mr. SCALIA. The problem with the 1974 amendments is that they go from one extreme to the other. The *Mink* case was the extreme of the court looking not at all beyond the rubberstamp. If the document was stamped "Classified," the court's job was done. The 1974 amendments go to the other extreme. The court, on its own, de novo, is to determine, with the burden of proof on the Government, what consists of national security information—what is protected under the Executive order. It seems to me there is a middle ground between the two.

I can acknowledge the inadequacy of the *Mink* rule, but between the two there is a requirement for certification at a high level of the executive branch. I think that would solve it. As I pointed out, it is indeed the course that has been taken in legislation that applies to much more significant matters of legislation involving foreign intelligence electronic surveillance.

Senator HATCH. The act currently sets a time limit of 10 days. I would like you to give us a little bit of the historical perspective on how that limit came into being and what we might do under appropriate circumstances to change the limit to a longer term.

Mr. SCALIA. I cannot give you much historical perspective as to how it came into being, because by the time I arrived at the Department the legislative process—what there was of it within the executive branch—had effectively been concluded; the die was cast.

I can say this about it: Whether or not it is the most destructive portion of the act, I find it the most offensive portion of the act, because it places in violation of the law—it is known to place in violation of the law—perfectly conscientious and law-abiding officials in many agencies.

My experience with these officials is that they do not like to violate the law. They do try to do what they are supposed to do. When Congress enacted that 10-day provision with a 10-day extension, it was clear that it would not be able to be complied with. It is clear today that it is not able to be complied with. I think it is absolutely horrendous to have on the books a law which is intentionally framed in such a way as to invite noncompliance.

Senator HATCH. You have given us an excellent perspective of the 1974 amendments to FOIA, but in this historical context can you tell us why the Government only collects in fees 2 percent of the amount it costs to respond to FOIA requests and what has inhibited the collection of fees, in your opinion? And, if it is possible, how can we make FOIA pay for itself completely?

Mr. SCALIA. I think the big difference between the 2 percent and the 100 percent is the process of the law, most of which consists of

determining whether the very detailed exemptions that are now in the act are applicable and deleting portions that are covered by the exemptions. It is a tedious process; it cannot be done by low-level personnel in all cases. The way to make up the gap could be done in a number of ways.

To the extent that the categories of exemptions are broadened, so that it is not so tedious to determine whether an exemption applies and to delete only particular portions as to which that narrow exemption applies, the processing costs will represent a much smaller proportion of the total.

The other way to solve the problem is simply to charge for processing costs. This is what I proposed in my testimony. But as I said, the two, to some extent, depend upon one another. To the extent that one has more categorical exemptions, the significance of the processing costs reduces.

Senator HATCH. You know, that is what we are trying to do in our bill—provide for the processing costs. We just had our historian in here today saying that such a change would make it very difficult for them.

I say, in the least, this bill has many, many difficulties, and of course almost everybody admits we need to tighten up and refine the language.

We have appreciated your testimony here today, and I am sorry that we had to delay so long, but it is important that we complete the record.

I think it may be important that we listen to our ranking minority member and invite Director Webster and maybe even the CIA and the Justice Department into a closed executive session, and chat with them, so that all members of the Judiciary Committee are aware of the tremendous difficulties they have with law enforcement officials to resolve these problems, some of which you have raised.

We appreciate your time, and with that we will recess the subcommittee until further notice.

[Whereupon, at 6 p.m., the hearing was recessed, subject to the call of the Chair.]

FREEDOM OF INFORMATION ACT

WEDNESDAY, DECEMBER 9, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

[On December 9, the Constitution Subcommitee held a final hearing on S. 1730. That hearing was classified. The two witnesses, Director Casey (CIA) and Director Webster (FBI) did, however, consent to provide a sanitized version of the proceedings for publication in the hearing record. To be complete, therefore, we should report that this final hearing was held by preparing one more segment of our record which includes the following materials as the substance of the hearing.]

STATEMENT OF WILLIAM CASEY, DIRECTOR OF CENTRAL INTELLIGENCE

Mr. CASEY. Mr. Chairman and members of the committee, I am pleased to have this chance to appear this afternoon. My purpose is to bring before you the damage the Freedom of Information Act has caused American intelligence and to urge quick and prompt action on the proposed legislation by the requested exemption.

I am going to confine myself to the specific examples.

You have heard my general views on the damage that this legislation does, the cost and the burden of the loss of information that it occasioned, and I think you want to hear about specific examples. I was reluctant to provide them when I testified previously.

Senator HATCH. Mr. Director, we understand it, are you giving us all the examples or are you just giving us a scattering?

Mr. CASEY. I mentioned 15 examples. I have given you 15 concrete examples and I have got some things to show you.

As you can imagine, our relations with liaison services and our attempts to recruit agents and maintain productive relations with them have been hampered in ways we don't know. We do not know what information was withheld without our learning about it. We don't know how many agents have turned their backs on us or have failed to undertake to report things that were particularly sensitive because of the undermining of the confidence in our ability to hold that information.

In the spring of 1979 a senior intelligence official of a [deleted] South American country stated his service is now unwilling to share any information with the CIA for fear that they might soon be reading about it in the newspapers.

The official stated that the U.S. Government is now allowing the press and any individual to obtain sensitive information for its Government offices through some ridiculous law, as they put it.

We have concrete evidence that this country, [deleted] which has previously provided us good intelligence; is witholding information from us now.

So we have clear evidence that this country quit and cut us off. The foreign minister of one of our allies told my predecessor that he had told their intelligence service not to pass information to U.S. intelligence, in part because of FOIA.

In March 1979 because of public disclosure in the United States we learned that security officials in an Asian country were taking precautionary measures in their dealings with the CIA and that there was a withholding of information which previously would have been provided routinely.

Senator SPECTER. Mr. Casey, does that suggest we have to review the whole act in order to have a liaison service supply the information?

Mr. CASEY. It suggests that we have to exempt the intelligence agencies from the act.

Senator SPECTER. Totally?

Mr. CASEY. Totally. Totally.

Senator SPECTER. Are you going to cover how much, to what extent you have to disclose information now under the Freedom of Information Act?

Mr. CASEY. We have to disclose information and we have certain exemptions that were utilized, but the problem is the perception that exists, that occasionally things have slipped through and we make mistakes and information has come out. As long as we are subject to these requests no other service can be confident that what they give us will not be victimized in that way.

Senator SPECTER. So your position here is that nothing short of total exemption of the CIA will be suitable?

Mr. CASEY. Yes. Nothing short of complete exemption at the CIA—the CIA, the NSA, and the Defense Intelligence Agency—will adequately restore the confidence to reestablish our working relationships and the full exchange of information with many foreign intelligence liaison services we work with and fully restore the confidence that our agents must have so we could acquire good agents and maintain their confidence.

Senator DECONCINI. Would the Senator from Pennsylvania yield just to follow that up?

Mr. Casey, as I understand some of the problems that you have just mentioned here, are the fact of human error and sometimes the burden of the request and the period of time that you have to respond to it, couldn't some of that be resolved or alleviated by looking at some relief as to the time to permit your agency to thoroughly review it before you had to release it without totally exemption?

Mr. CASEY. I don't think any amount of reviewing and any amount of time would provide assurance that information would not—s no other intelligence service in the world has to meet this requirement. As long as we have to meet it we are going to be con-

sidered the odd man out, and I don't think we can overcome that in any other way.

Senator HATCH. It's more than that too. Director Webster testified that wasn't it in one case a judge ordered you to produce 40,000 pages a month?

Judge WEBSTER. That's correct, Mr. Chairman.

Senator HATCH. And that is impossible to do without error. Now that could happen to, I take it, you agency under present law, although you have power of exemption. Am I correct, Director Casey.

Mr. CASEY. Yes.

Senator HATCH. If you are ordered——

Senator DECONCINI. Orrin, that is my point. I had not heard the Director talking, but Judge Webster testified that there is a certain amount of human error and I just want to clarify what the Director is saying here, that the only reference he has made here, I think, is the fact that it is a perception that there can be some errors made.

Mr. CASEY. I want to make it clear that I am not talking about information under U.S. citizens—the Privacy Act. We are not asking for exemption from that. We are talking about foreign intelligence—the kind of information we exchange.

Senator DECONCINI. Anything that would be classified as foreign intelligence. That's all I had. Thank you.

Senator HATCH. Could you also tell us how many personnel the CIA presently has working on freedom of information matters? Director Webster indicated you have 300 or thereabouts full time at headquarters, not counting others in the field.

Judge WEBSTER. That is correct. Over 300.

Senator HATCH. Over 300. And it costs you about $15 million a year—15 or 16?

Judge WEBSTER. I think it's around $12 million last year, but it's going up.

Senator HATCH. You estimated $15 million next year.

Senator LEAHY. I have a question on this question of 40,000 pages the court ordered. Did you appeal that order? Have you been delivering the 40,000 pages?

Judge WEBSTER. This was the case that had to do with the Rosenberg execution and we did deliver them. It is my understanding that we took as many appeals as the Department of Justice would permit us to take and we were confronted with this order which we complied with.

Senator HATCH. As I understand it you were also behind in the schedule on that order on a number of occasions. You just could not comply with it.

Judge WEBSTER. We are behind in all cases now, as much as 120 days behind, based on the budgetary resources available on our line item budget for this purpose.

We cannot maintain the 10-day response time that the statute requires and I reported that to Congressman Pryor's committee, which is looking into Freedom of Information, in the House 2 years ago.

Senator SPECTER. Mr. Webster, do you know if you did appeal, in fact?

Judge WEBSTER. I am advised, as I said, Senator, the Department advised us not to take an appeal. It is the Department's choice on those matters.

Senator LEAHY. If I might follow just on that, because of the Rosenberg case and this order was covering what dates?

Judge WEBSTER. I'm sorry, Senator Leahy?

Senator LEAHY. What dates was the order covering for the 40,000 pages. Was this for recent things or going back?

Judge WEBSTER. No, it was the old record of the investigation of the Rosenberg espionage case back in the 1950's.

Senator LEAHY. Have you had any similar orders, though, affecting things that could well be considered current, something along the lines of 40,000 pages? I'm wondering if that may be why the Justice Department probably did not take any appeals on it, because they had a feeling it might have been such an old case that it wouldn't have made that much difference. Or is that the reason?

I am trying to get a feel for this.

Senator HATCH. If you'd yield for a second, if I understood you before, you indicated that although these cases may be a long time in the past they still involve a continuum right up to the present.

Judge WEBSTER. Sources and methods are involved and there is a certain sensitivity and the courts are on an uneven basis, judge for judge, as to how those things would take place. In some cases—in one case we were successful in getting the judge to change his mind on an order that he made with respect to these materials.

Senator LEAHY. What was the Justice Department's reason for not appealing?

Judge WEBSTER. I really don't know.

If you would like, I would be glad to respond to that. It is a one-shot case that involved a lot of work on our part. I am not sure it is an appealable order.

Senator HATCH. It might be helpful if you respond to that plus indicate why it was such a difficult burden to produce the 40,000 pages a month. How many total pages were involved? And I think you asked a second question, and that is do you have any similar cases that are occurring?

Judge WEBSTER. I have been given two cases. Our lawsuit, *ACLU* v. *Chicago,* which involves the requirement of processing 3,000 pages per week up to mid-1980 and another case, the *NLG* case, 2,000 to 3,000 pages per week. I am sure there are others.

Senator HATCH. Didn't that regard the Alliance of Oppression, a Communist organization with a lot of sensitivity to it? And it means how many agents would you have used to comply with 3,000 pages wherein you are concerned about the sensitivity?

Judge WEBSTER. I am not up on the management of the details, but I do know what they have to do. They have to look at it line by line, word by word, and not excise any segregable information. And the only basis for closed files such as the *Rosenberg* case would be if it would identify informants. Unless we could say that it would identify an informant—not might or can do—or is likely to, we have to then release that part of the words on that line. And so it is a slow, tedious job. Even those that are opposing these changes recognize that it's slow, tedious and subject to error.

Tom Johnson, the chief executive of the Los Angeles Times, located in Washington, recognized that.

Senator HATCH. It was a very interesting sort of comment that he made last evening indicating that the media should have to comply with a set of ethics like everybody else and indicating that they don't.

Unless there are any other questions, I think we ought to get the examples out first, although I have remarked the purpose of this is to get through the examples.

Senator LEAHY. I wonder if I might follow up on a couple of statements that I have heard here in the committee just to make sure that I understand, because Mr. Casey is gong to be responding—I mean, Mr. Webster is going to be responding.

I thought it would be very helpful if we knew. I know I have heard the example of the 40,000 pages and I am very concerned about that happending and so I would be interested in knowing why the Justice Department did not bother to appeal.

Senator HATCH. He said he would provide it.

Senator LEAHY. Yes; I know. Make sure that we have that. Again, if there are some ongoing ones and also if I could have——

Senator HATCH. On that point, we are marking up Monday. Is there any way you can get it to us before that?

Senator LEAHY [continuing]. Some indication of the number of cases, Mr. Webster, in which cases have been lost—criminal prosecutions have been lost as a result of FOIA requests, if there are any, the number of cases in which an informant's effectiveness has been destroyed as a result of FOIA requests.

Those seem to be a couple of things that at least one of the arguments that I have received in favor of restricting FOIA have been because we will lose cases if we don't restrict it and we will lose informants if we don't restrict it.

Judge WEBSTER. I am not sure I understand what you mean by losing cases. Are we talking about investigative cases or prosecuted cases?

Senator LEAHY. Prosecuted cases—cases that we had—well, at either stage, cases we intended to prosecute that we are not able to prosecute because of leaks as a result of FOIA requests. Have there been such cases?

Judge WEBSTER. I'm sure that there is no greater detail. I have asserted our claims and I am encroaching on Director Casey's time, but I have asserted ours on the basis of protection of sources of information.

Senator LEAHY. Have we lost sources? Have we had the ability, have we had the efficacy of a source destroyed as a result of responding to FOIA requests? Have we lost a source?

Judge WEBSTER. You mean that somebody shot him dead in the water?

Senator LEAHY. No; have we had somebody say hey, look, I have been a darn good source to you for the last 10 months. I'm not going to be any more because you answered this FOIA request. I mean in any way.

Judge WEBSTER. I gave the committee a number of cases in open session. I am going to give them some today.

Senator LEAHY. All right. And then one last followup on what Director Casey was saying before. As I understand it from testimony today and other times, we now find ourselves sort of a black sheep with the other intelligence services around the world because we are subjected, or the CIA is subjected, to FOIA.

I am not sure just how far that goes considering the fact that could be looking at a number of these other intelligence services and pointing out [deleted] virtually all the ones that we deal with on any basis, we can show some—virtually every one of those—reasons why we should be considered. They all had highly placed moles at one time or another. They have had some enormous scandals and leaks within the top of their intelligence agencies—sex scandals, leaks, bribes, everything else. And we, of course, have had one thing that virtually none of them, in fact none of them, have been able to match, and that is our ability to collect certain intelligence every one of them, to my knowledge, at one time or another has been very anxious to have from us the results of some of that [deleted] intelligence.

Are you saying that they would be willing to forgo that by cutting off cooperation with us because of FOIA?

Mr. CASEY. I am saying that they do cut off cooperation with us because of FOIA, to what extent we don't know. I am citing specific examples.

Senator HATCH. Why don't we go through the examples?

Mr. CASEY. It is quite different. The presence of a mole here and there is serious enough, but it is quite different from having a persistent, continuing requirement to do something that is unheard of and nobody else does it in the business.

Mr. Chairman, if I may go back.

Senator HATCH. Let us go through the examples because we are limited in time today and I do not want to foreclose questions. But we have covered a lot of these materials in our hearings and what we are interested in today are the actual examples that you could not talk about in the open hearing room and why you need to give them here.

Mr. CASEY. I have given you three examples where there has been a withdrawal altogether. Now let me give you some examples of reluctance and hesitation on the part of foreign liaison services.

A high ranking liaison officer of a European country noted that Americans had to be dealt with in a different way because of FOIA and the CIA could not protect the secrets that were exchanged with them.

A FOIA case prompted one intelligence service to consider policy revisions that can hinder counterintelligence exchange with us. They remain cautious today in dealing with us [deleted].

A senior foreign intelligence official stated in 1980 that his service had to be very careful about passing information on their nationals because of FOIA.

Just a couple of months ago, a high-ranking foreign army official expressed doubts that certain sensitive information of interest to our Government could be released, citing again, doubts about our ability to protect the data which could possibly, in their view, indicate the source.

FOIA disclosures of CIA activity in another country have made our liaison relationship there extremely sensitive. Our Chief of Station was told recently by a high-level official of that government that he would be declared personna non grata and asked to leave within 48 hours if any information leaked which that government could consider serious enough to do so.

The Deputy Chief of another service expressed concern to Admiral Inman in 1980 over U.S. laws and our ability to keep even those secrets we have pledged them that we would keep.

The Chief of Station in one country reported a couple of years ago that the liaison service had become extremely apprehensive concerning revelations of intelligence information through various U.S. laws and procedures. This is apprehension, as distinguished from the earlier case where certain information was—they ceased to provide it.

[Deleted.]

Some measures taken by foreign liaison services to insure their own security in light of FOIA demonstrate great concern on their part that we cannot be certain that procedural arrangements fully allay that concern and whether it is supplemented. These procedural arrangements are supplemented by withholding especially sensitive information.

The examples here are concerned over FOIA in the late 1970's. [Deleted] and that is just an indication of concern and a procedural attempt to deal with that concern.

The concern of one liaison service has caused them to mark all documents or material passed to us with the following statement: "This document is the property of that government. It is loaned to your Agency only and not to be reclassified or further disseminated without the consent of the originator."

All of this should make clear the negative impact that FOIA has had on the intelligence liaison relationship. We can never be sure how great our intelligence losses have been because of FOIA from the refusal to pass information on to us because we don't know what is being withheld.

So it is clearly impossible to quantify the damage, but it is quite clear that we will not be able to maximize our intelligence potential as long as these requirements sow suspicion and undermine the confidence of our foreign intelligence liaison partners.

Another problem that we have experienced with the act is that documents released all too frequently lead to distortions and misinterpretations. The process required by law is such that the Agency must offer at least portions of raw, unevaluated information which are frequently fragmentary along with evaluated studies which are more thorough and accurate.

The requester, of course, has the option of using whichever document he chooses. A case demonstrating this problem relates to the June 1967 attack on the U.S.S. *Liberty* in the Mediterranean by Israeli forces. The American Palestinian Committee wrote to us asking for access to information on the sinking of this ship; both evaluated and unevaluated data were made available.

Subsequently it was learned that the American Palestinian Committee was intending to publish, through newspaper ads, only those raw reports which bolstered their contention that the Israelis delib-

erately, without provocation, atacked the ship, even though this information was directly in conflict with the evaluated reports.

So the act not only deprives the American people of foreign intelligence which may be critical, it provides them with incomplete and misleading information. Many requests for information have to be entered with documents from which many segments are deleted. Anybody who views it is likely to get only a false and distorted picture of reality and this can damage reputations.

The late Dr. Dooley, who was cited as one of the most admired living men in the Gallop poll in 1959 for his work in the jungles of Southeast Asia was linked to the CIA as an informant during a Roman Catholic Church inquiry toward making him a saint. The basis for this claim is the release of 55 documents to 1 requester under FOIA and 6 to another.

The number of documents released was inflated in newspaper articles to nearly 500 CIA documents and the requester was called by the Information Review Officer. It was acknowledged that a Notre Dame magazine writer and a wire service had taken an ambiguous statement and had misinterpreted it. The writer's own effort to have the wire service correct their own erroneous reporting were to no avail.

Let me show you how after hundred of thousands of dollars are spent evaluating what can be released frequently tattered and meaningless documents are delivered to researchers. Do you have that? I would like to just pass it around and show you what frequently comes out of this after spending all this money and all of this effort and paying the cost and impairment to our intelligence effectiveness.

Finally, I would like to emphasize again that we are the only Nation in the world whose intelligence agencies are subject to this kind of requirement. Handling these requests requires the heavy participation of our operational officers, experienced men and women who have been carefully selected and trained who should be devoting all of their energies to acquiring intelligence, to have their time used this way.

It is importnat to realize that security requires——

Senator HATCH. That's an amazing example.

Mr. CASEY. I just have a few more points that I want to make. It is important to realize that security practices require intelligence files to be compartmented. They can require searching through as many as 20 to 30 separate files to meet a single request and the Freedom of Information Act process destroys, in our case, the established intelligence practice of confining information to those who have an absolute need to know.

Now we have got to take these reviewers and let them run through a whole range of files and our professional partners know this and they just shake their heads in dismay. They cannot really consider us a professional intelligence operation as long as we have got to go through this kind of process.

Our agent network is placed in jeopardy. Good agents decide they cannot entrust their careers, their lives, their reputations to work for us because they just don't have confidence that we can keep secrets.

Senator HATCH. You have pinpointed some agents who have quit for that reason?

Mr. CASEY. Yes.

Senator HATCH. How many do you have, Mr. Director?

Mr. CASEY. I don't know. We certainly don't have them all. You quit because of a variety of reasons, but we can establish that many people have signed off because they feel that everything we do——

Senator DECONCINI. Can you tell us how many? Six? A dozen? Three dozen?

Mr. CASEY. I really can't tell you. I would be guessing. I would be guessing.

Senator DECONCINI. But you know firsthand having talked to some?

Mr. CASEY. No, no. I get this as hearsay in the organization.

Senator DECONCINI. From your own employess?

Mr. CASEY. I made an inquiry to develop these liaison illustrations and I might be able to develop some, but I think it might be more difficult when talking to agents. When agents disappear they disappear. You lose contact with them. I am sure that our case officers will be able to testify to examples.

Senator DECONCINI. Is it possible that would be a good excuse to us if you wanted to get out of the service of the CIA for a lot of other reasons, to say, you know, it is just too risky because of the act?

Mr. CASEY. You don't have to resort to that excuse. If you want to get out you just quit. Nobody's compelled to do it. We rely on volunteers.

Senator DECONCINI. I understand.

Senator HATCH. But you are saying that some of your administrative people have said that a number of agents have quit for this reason? You are definitely saying that?

Mr. CASEY. Oh sure.

Look we have it every day.

Senator DECONCINI. You say every day?

Senator LEAHY. That is 30 a month.

Senator DECONCINI. Thirty a month?

Mr. CASEY. It is a recurring situation. In the last couple of months we have had two instances where very productive agents in very important countries have asked to be taken out on the basis that they felt insecure.

Senator LEAHY. Because of FOIA?

Mr. CASEY. Well, I can't say that. I can't say FOIA. The general atmosphere of insecurity and lack of confidence in the ability to keep secrets.

Senator LEAHY. Well, I think, Mr. Chairman, every member of this committee, if I read the committee right—it goes for myself and everybody else—feels that there should be some changes in FOIA involving the CIA and FBI, but our concerns—and I think Senator DeConcini raised a good point—that these people who have left or asked to be reassigned because of FOIA, I think it might do us a lot of good if we could get some firsthand from them, if maybe we could be put in touch with some. We do not need to have dozens of them.

Senator DECONCINI. Pat, these are informers, not agents.

Senator LEAHY. The Director said agents.

Mr. CASEY. I said sources, individual agents I'm talking about.

Senator DECONCINI. They are foreign sources, not employees.

Senator LEAHY. Are there any employees?

Mr. CASEY. I don't know.

Senator LEAHY. I thought I understood you to use the word "agents."

Mr. CASEY. I talk in terms of case officers who recruit and operate agents. The agents are the people abroad or anywhere.

Senator LEAHY. [Deleted.]

Mr. CASEY. I will concede that point, Senator.

Senator LEAHY. And they have——

Mr. CASEY. That doesn't mean you want to have it publicly paraded.

Senator LEAHY. No, and that is why I also say I think that is unfortunate that something like that comes out. And it is unfortunate that it was allowed to leak out. And whoever let that one go past, someone was not being aware of their practice or sensibilities that they do show in maintaining the fiction for whatever reason.

Maybe this is not the place to bring it up, but I do understand you correctly in saying the agency determined that the attack on the *Liberty* was not an intentional attack and that the Israelis did not know the *Liberty* was an American vessel?

Mr. CASEY. I have not read the reports, merely in gathering information one of the examples provided me is the release of an evaluated and the raw report arriving at different conclusions, giving the demander the right to use either one and attribute it to the CIA.

Senator LEAHY. [Deleted.]

Mr. CASEY. [Deleted.]

Senator LEAHY. [Deleted.]

Mr. CASEY. [Deleted.] we are talking about now, which is a systematic drain and vulnerability that we cannot get away from. We can say look, we will do better in the future. As long as we have a statutory obligation we have a statutory obligation. We are not going to recover that confidence.

Senator SPECTER. Mr. Chairman, can I ask one question before we go on? I have to preside at 3.

Mr. Casey, would it be sufficient on the problem with intelligence agencies of other nations if there were an expressed provision that excluded giving any information that comes from them? Wouldn't that solve the problem? Would that problem be raised?

Mr. CASEY. I think that would certainly alleviate the drain. I don't think that would eliminate the problem. Frequently you don't know where information comes from. It gets incorporated in an analysis, some study, and if that goes out it can reveal where it came from or the people who know that what they gave us would see it there.

And I don't think it would be 100-percent accurate. It doesn't answer the problem we have with respect to our individual agents.

Senator SPECTER. [Deleted.]

Mr. CASEY. [Deleted.]

Senator HATCH. I have seen documents where they have been correlated reports that do not tell their sources. I mean, that is done all day long every day.

Mr. CASEY. The whole analytical process requires that. Of course, you could perhapts identify sources if you had that exemption.

Senator DECONCINI. [Deleted.]

Mr. CASEY. [Deleted.]

Senator SPECTER. [Deleted.]

Senator HATCH. [Deleted.]

Mr. CASEY. [Deleted.]

Senator SPECTER. That might be an easy answer.

Mr. CASEY. It does not deal with the agent problem. How do you assure confidentiality of your agents?

Judge WEBSTER. Mr. Chairman, if I may make a comment on this, because I will be commenting on this in my own examples, that narrow type of exemption, Senator, as the law is now postulated, requires you to give that reason. That is to say, we cannot disclose—we will not disclose certain things because it is given to us by another country. We have an example that I am going to talk about in mine in which the people say for that reason we will not give you anything because then they know we are talking to you.

Senator LEAHY. Do we have to identify the country?

Judge WEBSTER. Uh-huh.

Senator HATCH. Have you furnished, Mr. Director?

Mr. CASEY. Yes.

Senator HATCH. We will turn to the FBI and we will probably have some questions for both of you.

[In December 1981, Director Webster testified in executive session before the Subcommittee on the Constitution, Senate Judiciary Committee. He described in detail cases in which hostile foreign intelligence services, organized crime figures, members of terrorists groups, and others have used the Freedom of Information Act to identify FBI informants and frustrate FBI investigations.

[Members of the subcommittee have seen a demonstration of the manner in which the act can be used for these very purposes.

[Chairman Hatch asked the Director to provide for the public record information concerning costs incurred in complying with the act as well as a document which reveals, to extent possible, the specific examples about which he testified. As those who heard the testimony can understand, complying with the request necessitates eliminating some examples altogether and publishing others in a highly diluted form. It simply is not possible to chronicle here, for example, the manner in which the KGB and the Communist Party have used the act, nor do circumstances allow reconstruction of the FOIA blueprint criminals have followed to the detriment of the FBI.

[Those who read these materials not only should realize these accommodations had to be reached but also appreciate the severity they evidence.]

STATEMENT OF WILLIAM J. WEBSTER, DIRECTOR OF THE FBI

Mr. WEBSTER. During November 1981, I received a communication from one of our special agents in charge of a field office con-

cerning a conference on organized crime jointly conducted with a foreign ally.

That communication relayed the following information:

During a discussion of membership of the foreign crime families, a U.S. official asked the foreign conferees if they would furnish the U.S. conferees with a complete list of the 100,000 crime family members, including criminal records and investigative status. A foreign official advised that it would not be possible to do so. He did not elaborate on his response at that time.

During a discussion of the U.S. Treasury enforcement communications system [TECS], the same official asked whether the TECS was secure, and a customs official advised that it was. He then asked whether it was not a fact that any foreign crime family could make a Freedom of Information Act request in order to learn whether he was a subject of the TECS, or for that matter, any system used by U.S. law enforcement. He also asked whether the foreign crime family member could then learn that information had been furnished to the U.S. authorities by foreign authorities.

He and the other attendees were advised that information from foreign governments was able to be excluded from release under at least two exemptions of the Freedom of Information Act and as a matter of practice this was always done. In a later private exchange he asked what sort of response was given to a foreign subject if there was a pending investigation at the time of the request, since he understood that the law had no provisions to deny the existence of records in such a case. He asked then if the requester might not make an inference from a response different from a response that denied the existence of records. A discussion of the difficulties in responding to such a request ensued, and the concern of U.S. law enforcement regarding the absence of a denial provision was expressed. He advised that one difficulty the foreign authorities faced stemmed from the proposition that any foreign crime family member who received anything but a blanket denial from a U.S. agency could conclude that whatever sort of investigation did exist, must exist with the knowledge and cooperation of the foreign authorities also. From his persective, submission of the names of the members—and other information—raised serious problems.

In continuing conversation, other ramifications of dissemination of information to U.S. authorities were discussed. One foreign official, who has an excellent grasp of the U.S. Freedom of Information Act, strongly noted that his country had resisted such a law.

At the conclusion of the conference, the foreign law enforcement personnel stated that they would study the issue of whether the names of known organized crime figures—and other information—could be furnished to U.S. authorities.

The above information is furnished specifically because it described the concern of a foreign country with a difficult international organized crime problem. The foreign law enforcement personnel clearly indicated how invaluable our information is to them, and recognize that they will need similarly to furnish information to us, since their organized crime members are increasing their activities throughout the world, and particularly in the United States. The foreign authorities had a very good grasp of the difficulties the Freedom of Information Act had caused and the chilling

effect the Freedom of Information Act has had was obvious to the U.S. delegation.

It is interesting to note that our foreign associates are aware of the damage which can result when a law enforcement agency does no more than admit the existence of a record.

The FBI lost a top-level organized crime informant who was our most reliable source of information regarding a branch of an organized crime family.

The association between the FBI and his source began over a decade ago. More than 10 years of careful development followed. As his contacts within the organized criminal society increased, he was able to provide the identity of subjects in several FBI bank robbery cases and help resolve a major theft. Most important, he became the confidant of a ranking member of the family through whom we gained valuable organized crime intelligence.

Several years ago, our special agent handling this source noticed that the information being disclosed was not so detailed or current as it once had been. The informant would relate that a meeting had taken place, but would not reveal those aspects of the meeting that could be traced to him. He would reveal nothing of a singular nature.

This curtailment of information not only impaired our once solid coverage of the organized crime target in this area; it also diminished our agent's ability to control and direct the informant and his services were discontinued.

How did we lose this source? The organized crime figure targeted by this informant received a quantity of FBI documents requested under the FOIA. The target displayed the documents, spread them before the source and said: "Let's see if we can find out how they got all this." The source was never the same.

Fortunately, our agency had alerted the informant to this possibility. Had the informant not been prepared, his ignorance and apprehension concerning what the records contained could have made him so ill at ease that the target's suspicion could have been aroused with serious consequences.

When questioned about the incident by the agent, the informant said he had complete trust and faith in the agent, but doubted the FBI's ability to protect information provided by its informants. He also pointed to the increasing popularity of the FOIA as an amusement whereby organized crime leaders obtained FBI records to taunt and intimidate members of their organizations from making any contact with law enforcement authorities.

I have an example of that being done. An organized crime figure demanded and received FBI documents under the act. He confronted the proprietor of a business establishment whose only association with the FBI had been a short, unsolicited interview, several years earlier. In the midst of a casual conversation, he asked the proprietor if he had been contacted by the FBI several years ago. Nervously, the proprietor denied such a contact. The organized crime figure laughed and walked off. A distraught proprietor telephoned the FBI shortly thereafter for an explanation.

We received informant information that organized crime members in the Detroit area have been instructed to submit FOIA requests to the FBI in an effort to identity our sources.

This scheme is being implemented. To date, 38 members and associates of the Detroit organized crime family have made requests. The list of requesters reads like a who's who in organized crime in Detroit. The head of the family, the former head, and other prominent members all have made requests.

Through this concerted effort, the members and associates of this family have obtained over 12,000 pages of FBI documents. The family now is free to pool these materials and analyze the FBI's documents to whatever level of sophistication and scrutiny their abundant resources permit.

At the least, these documents will reveal the scope and limitations of our investigations of organized crime in the Detroit area; that is, those criminal activities we investigated and those about which we evidently knew nothing. Thus we probably have alerted our adversary to potential dangers in some areas while exposing our lack of knowledge about others.

Other possibilities exist as well. The released information can be combined with the family's collective knowledge of all that transpired, who was involved, and when. It may be that information released because it appeared to us to be "reasonably segregable" will provide the missing piece of information in the family's effort to identify informants.

A few years ago, a field office notified FBI Headquarters that an informant who had furnished considerable information concerning the Weather Underground was very upset about the FOIA. He told agents he had learned that former and current radicals were filing FOIA requests in an attempt to identify informants.

This information was correct. From 1975 through 1981, over 70 members or former members of the Weathermen have made FOIA requests of the FBI. In addition, the FBI has released over 60,000 pages of documents concerning the Weather Underground to a west coast attorney who represents individuals connected with this organization.

On October 20, 1981, a Brinks' guard and two police officers were killed during the commission of an armored car robbery in Rockland County, N.Y.

Among those who have been charged or are being sought in connection with this incident, are persons who were associated with the Weather Underground. The individuals who allegedly participated in this violent act and the organization with which they were associated have made thorough use of the Freedom of Information Act. Of those persons who have been charged or are being sought in connection with these killings, five made requests to the FBI for documents concerning themselves, and four of those persons received documents from the FBI pursuant to the FOIA.

While the fact that the informant information in this example seems like "old news," this tragic armored car robbery provides a stunning demonstration that persons who were associated with seemingly dormant organizations may surface with violent results. It drives home the point that we never know what use groups and individuals may be making of information released under the FOIA.

In the early 1970's an informant belonged to an organization allegedly engaged in criminal conduct. In the late 1970's leadership

of this small group submitted FOIA requests to the FBI. Upon receipt of excised material, these individual began to suspect that there were one or more Government informants in their midst. As they began to compare our releases, they were able to pinpoint the identity of one of the two Government informants who had successfully penetratd the group. The other informant was told that he was suspected of being an FBI informant.

The leadership then instructed all members of the group to make FOIA requests to the FBI for the purpose of further comparison of information in order to ferret out additional Government informants.

The special agent in charge of the field office advised that this informant feared for his physical safety and livelihood, and our confidential relationship with him was terminated.

The Freedom of Information Act presents the potential for damage to sensitive FBI investigations, even in cases where no release of substantive information is made. A requester with an awareness of the law's provisions, a familiarity with an agency's records systems, and whatever personal knowledge he brings to the situation, can gain insight into FBI operations regardless of his ability to procure a release of Bureau docments.

An example of this potential problem is the case of top organized crime chief who, acting through his attorneys, made a number of requests under the FOIA for FBI documents pertaining to his activities.

He became the focus of an extensive FBI undercover operation. He filed another FOIA request with the FBI, asking whether it or any other agency was conducting an electronic surveillance of him. You should note the sophistication of the request. He asked only for documents pertaining to an electronic surveillance. Any FBI response other than a "no record" could be interpreted as an admission that we did have such coverage.

While the request was being processed, the existence of the FBI investigation was publicly revealed, and the requester was indicted.

While it cannot be said with certainty what the requester's motives were, it is not unreasonable to assume that he was interested in obtaining information concerning the FBI's knowledge of his activities. Had he been notified we were withholding documents under the pending investigation exemption before he was indicated, the organized crime boss would have been put on notice that the FBI had active investigative interest in him, possibly jeopardizing the undercover investigation.

Recently we received an FOIA request from an individual closely associated with a group which has claimed credit for bombings and murders.

The requester is demanding records relating to particular activity in 1980, records relating to certain activity in 1981, and records not only in FBI Headquarters but also in several specific localities.

If we withhold any information, the requester demands to be told, as the act requires, the specific exemption we rely upon to withhold the information.

In some cases informants may be identified by noting the dates and geographic location of investigative activity and reasons we cite to justify withholding information. The requester can add his

own knowledge of dates, places, and events to these facts and pinpoint the source.

A Federal inmate convicted of unlawful interstate flight to avoid confinement for robbery and assault to commit first-degree murder of sheriff's officers confronted and threatened an FBI source in the prison exercise yard. This source had provided valuable information to the FBI in relation to a bank burglary conspiracy matter which involved the inmate. The inmate showed the source an FBI document which was released to him under the Freedom of Information Act and accused the source of being an FBI informant. This accusation was based on the inmate's reasoning that because only 3 people knew the details of the crime discussed in the document, and two of those names appeared in the document caption, the name of the missing person also must be the name of the informant. In order to protect his life, prison authorities had to transfer the source to another facility. His usefulness as a source is ended, and word has reached the street that this man is an informant. This example demonstrates an instance where the requester's personal knowledge, coupled with the absence of certain information, led to the exposure of a confidential source of the FBI.

A group whose members advocated the violent overthrow of the United States made FOIA requests to the FBI.

We withheld almost all the information in the files. As the act required, we cited the exemptions upon which we relied which in these cases were the exemptions for classified information and for informant information.

Even with maximum utilization of exemptions of the FOIA, our responses told them that we knew about them and that an informant was in their group.

The effectiveness of our source was brought to an end as was our access to reliable information concerning the group's future activities.

FBI agents are investigating allegations of political corruption and gambling in a major metropolitan area. Several of the principles in this matter are ranking city employees. By controlling key positions in their department, they can transfer or intimidate those employees who could jeopardize their illegal activity by cooperating with the authorities.

The central figure in this matter, soon after our agents started looking into the gambling allegations, made a request under the Freedom of Information and Privacy Acts for any FBI records concerning himself. He claimed to a fellow employee that through this request and the FBI's response, he could determine whether the FBI was investigating the matter, and, if so, the extent of our investigative penetration of the gambling ring in general, and himself in particular. He boasted that he could also pick our informers and persons in contact with the FBI through these requests. Seldom are we able to verify our suspicion that these statutes are used for this purpose.

In this case, we furnished the requester some collateral records while advising that all other materials responsive to the request were being withheld on the basis of the exemption designed to protect pending investigations. By asserting the appropriate exemption, however, we confirmed that an investigation was underway.

Soon thereafter, subtle changes were made in the operation, including the shift of personnel from the corrupt department to other duties. The purge successfully removed cooperative employees from the unit and completely disrupted the FBI's investigation.

Our confirmation of the employee's suspicion that an investigation was underway evidently prompted these countermeasures to thwart our investigation.

This next example, which did not involve the FBI, is another illustration of the problem.

In October 1980, a U.S. attorney complained that a newspaper printed a front-page story which was based on information obtained through the FOIA. He concluded that those involved in a murder and possible explosives violation were able to identify his informant.

Here is what he said:

> All of the names in the report were deleted with the exception of my own. My informant absolutely demanded anonymity because he was and is terrified. Now, (the subjects) know exactly who the informant was.
>
> Another informant in this case was a Federal District Judge. The subject filed an FOIA request and determined the identity of the judge. He then called the judge and harassed him. Needless to say, the judge was shocked. I doubt that either of these two informants will ever again cooperate with us.

We have been investigating a large-scale kickback scheme. Vital information was provided by a highly placed source familiar with the subjects in the case. These people have long operated on the fringes of legality and are on close terms with those in the highest positions of organized crime. They are surveillance conscious and suspicious of persons with whom they deal. Rarely can informants penetrate their ranks.

Some time after the FBI started investigating the kickback scheme, one of the subjects made an FOIA request for records regarding himself. Responsive to his request were the records of the current investigation conducted under the racketeer influenced and corrupt organizations [RICO] statute. As you know, when an FOIA request is for material in an active investigative file, we can deny the request but must explain why. That alerts the requester that he is under investigation.

The field office investigating the case warned that the current investigation was unknown to the requester and that any suggestion of its existence would jeopardize the safety of the FBI source.

A period of careful and deliberate correspondence with the requester ensued. Collateral, less sensitive records were furnished while the informant's data was withheld based on the informant exemption. What suspicion, if any, has been cast on the source is unknown.

The case is scheduled for presentation to a grand jury. We probably will never know if our FOIA release alerted the subjects and enabled them to attempt to frustrate prosecution.

The source has not been contacted by the subject in the past 6 months. We do not know what significance, if any, to attach to that.

Another witness in the case fled and has not been located. We do not know whether or not our FOIA release had anything to do with his disappearance.

On October 6, 1981, a midwestern office informed FBI Headquarters that a high-ranking law enforcement officer was making an FOIA request in an attempt to identify members of his department who had cooperated with the FBI in the investigation of public corruption matters in that country. Although associates of the officer were indicted, and he himself was under investigation, sufficient evidence to indict him was not developed. He did, however, suspend a subordinate who was a Government witness in the case because the subordinate had not notified the officer of his cooperation with the FBI in this matter. The case agent believes that the FOIA request is an attempt to identify other subordinates for the purpose of further reprisals.

The FOIA request was detailed, asking for information about several subordinates who had, in fact, cooperated with the investigation and providing personal information about them, such as their dates of birth. Processing of the headquarters files was completed in late 1981, and approximately 100 pages were released from FBI Headquarters' files. It is anticipated that an additional 150 pages of field office files will be released pursuant to this request.

A person involved with an extremely violent terrorist network who suspected informants in the group stated that in an attempt to identify these informants, multiple FOIA requests would be submitted to the FBI and the responses then would be analyzed. The group has, in fact, begun submitting requests.

A U.S. citizen declined to cooperate with the FBI in a unique opportunity to penetrate a hostile foreign intelligence establishment located in this country. Although otherwise willing to be cooperative, this citizen advised that he feared a future release of documents under the FOIA could reveal the extent of his cooperation and damage his financial livelihood.

An FBI agent, conducting a foreign counterintelligence investigation concerning possible loss of technology to a hostile foreign country, contacted an American businessman about a research program being conducted by his company. The individual was cooperative, but refused to release a copy of a company business report to the agent, fearing that business competitors could obtain the report through the FOIA and learn of the company's research activities.

In addition to the examples cited, the FBI has conducted analyses of FOIA releases and possible uses of the FOIA. In the former instance, the FBI has concluded that requesters can use released records to identify confidential sources despite diligent efforts by our analysts to protect these sources. Dates, geographic locations reporting investigations, the volume of material recorded in a given timeframe, even the absence of information in certain timeframes or from certain locations can substantially assist such analyses.

Mandatory response requirements of the FOIA necessitate that specific exemptions be cited even if all records are withheld. Such analysis confirms that sensitive investigations can be thwarted and suspected informants targeted and positively identified because of these provisions. Inherent defects of the FOIA pose not only grave risks to individual investigations and informants, but jeopardize as well the FBI's ability to effectively perform its Federal law enforcement and internal security functions.

COSTS

In 1974, Congress amended the Freedom of Information Act to broaden public access to Government information. The cost of this legislation was expected to be relatively small. For example, the House Committee on Government Operations determined that "additional costs that may be required by this legislation should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding 5 fiscal years." It is important to note this was the projected cost of FOIA for the entire Federal Government. The FBI alone spent $160,000 dollars on FOIA in 1974, and costs have skyrocketed since then. It is estimated that the FBI's total FOIA costs since that year have exceeded $55 million. This estimate includes personnel, administrative, litigation, and other costs to FBI Headquarters and field offices.

Little money is recovered from those who use the act. While Government agencies such as the FBI may collect search and duplication fees, the fees do not approach the act's true costs. For example, the FBI spent more than $12 million for its FOIPA program in fiscal year 1981, but recovered only $44,616 in fees during the last calendar year.

On November 12, 1981, Director Webster testified in open session before the Subcommittee on the Constitution, Senate Judiciary Committee. The following includes part of his opening statement and colloquies with some of the members.

You may be interested to know that we have released in response to Freedom of Information Act requests over 60,000 pages of FBI documents concerning the Weather Underground to a west coast attorney who represents individuals connected with that organization. Of those arrested in connection with the murder of two police officers and a Brinks guard, two have Freedom of Information Act lawsuits pending against the FBI right now.

The FBI does not know and has no way of knowing with certainty to what extent those 60,000 pages of FBI documents assisted those involved in the recent Brinks robbery. We do know two of those apprehended had received documents and were suing us under FOIA for more information.

On November 2, 1979, Joanne Chesimard escaped from prison where she was serving her sentence for killing a New Jersey State trooper. She left behind in her cell about 1,700 pages we had released to her under the Freedom of Information Act.

New Jersey authorities who studied those documents are convinced the information she received made the task of apprehending her again more difficult.

I cannot say whether or not the Freedom of Information Act has assisted Joanne Chesimard in her successful attempt to frustrate the efforts of law enforcement to apprehend her. I do know she was reading the documents when she escaped and I do know she remains at large.

* * * * * * *

Mr. WEBSTER. As I know the Senator is aware from past experience, getting at organized crime has been a tremendous challenge

for us. No other similar apparatus is better insulated and better protected at the higher levels.

We have enjoyed some significant successes in the last 18 months, most of which we can attribute, at least initially or throughout the investigations, to source information and undercover work. It sometimes takes years to develop that kind of information and put it in place at a level where we can actually find evidence, not just rumors but evidence, that we can use against top figures in organized crime.

You did not come here to hear me tick off our successes, but the importance has really come home to me in this area. It is a dangerous area. Reprisals are severe and sometimes terminal in terms of the objectives and threats where informants are concerned. They need to know that they are going to be protected and that their names will not find their way into organized crime hands. They need to be very satisfied about that. Otherwise, we are not going to get the information.

Senator DECONCINI. Is that a hindrance today?

Mr. WEBSTER. It is an enormous hindrance today, because they are aware that organized crime officials have, either on their own behalf or by using other intermediaries, sought this type of information and tried to identify those who were giving that kind of information.

They need to be reassured that every reasonable step that can be taken by Government—and that includes the Congress—has been taken for their protection. There are going to be risks in any event, but they should not be needless risks.

Senator DECONCINI. Director Webster, if an organized crime organization was anticipating going into some new venture—narcotics, extortion, or whatever—and they had a small group of decisionmakers to implement this plan, would it be possible for one or more of those organizers to find out, through the Freedom of Information Act, whether or not any of them were suspects or any investigation was ongoing either as to them personally or as to the type of activity they might be anticipated?

Mr. WEBSTER. One of the favorite ploys is to try to ask for a file and then see if we withhold it and what the exemption basis is. We have to state what the exemption is. Presently, if we say the basis is an ongoing investigation, they already have the information they want.

Senator DECONCINI. And that happens; is that correct?

Mr. WEBSTER. Yes; it does.

Senator DECONCINI. If an organized crime person wanted to use an alias name to find out whether or not there was any investigation as to some of the contact that he might have, has that been attempted, to your knowledge?

Mr. WEBSTER. The way the law is written, we have no basis for running a name back.

Senator DECONCINI. You do not know whether or not aliases are used?

Mr. WEBSTER. That is right.

Senator HATCH. Could I interrupt for just a minute?

Senator DECONCINI. Certainly. I yield.

Senator HATCH. I understand one of your dilemmas. You said in your opening statement that you had reached the limit of what you could say publicly about the FBI's problems in trying to protect informants. On the one hand, if you illustrate the problem too vividly, you may be furnishing ammunition to those who would like to make sure no one in their group becomes an informant. On the other hand, it seems to me that, unless you give some examples to Congress, you run the risk of not making a covincing argument for amending the act.

The journalists who testified prior to your coming here raised the issue quite strongly that the FBI cries wolf but rarely shows any concrete illustrations.

I wonder, without naming names, if you could provide for the subcommittee some examples of informants who have been identified as a result of the Freedom of Information Act. Maybe you could use hypotheticals; I do not care how you do it. If you could give us some examples, I think that would help.

Mr. WEBSTER. Mr. Chairman, I think I could reasonably anticipate that kind of a need on your part, and I have some information that I am in a position to give you. It is sanitized a little bit, so we will try not to point fingers at conditions that are still around us. And I would be glad to give more details in executive session to you.

Senator HATCH. Let us get what we can in nonexecutive session.

Mr. WEBSTER. Yes. We will go through a few of these. It is broader than just a specific identification of a particular informant. It is: Can they reasonably be concerned about our ability to protect them?

Walter Cronkite testified in connection with the "Stanford Daily" litigation. It is the chilling effect of the perception that, "If anybody could be identified, why not me?" They need firmer, clearly set parameters so that they know we can protect them and so that our agents, who will not go out and lie to their informants, can say with confidence and can build an informant base with confidence, that we can protect them.

We have identified informants who have told law enforcement and intelligence agencies that they will not provide information because they fear their identities will be disclosed through the Freedom of Information Act.

I have not gone back in detail, but in the report that I sent to you, Mr. Chairman, and others 2 years ago, I filled an appendix with paragraphs of particular cases that had been collected and reported back to us, not on a quota basis but by the individual offices, because I knew 2 years ago I was going to have to make this kind of case.

We have examples of situations in which individuals have claimed that they have identified sources through the act. They come and say, "We have figured this out," either talking to us or talking to the person who is the presumptive source. I have examples in which investigations have been harmed as a result of the act.

I think Senator DeConcini made reference to the visual demonstration that we have prepared. We prepared an initial demonstration to test our own assumptions on how vulnerable we were to

this type of logical analysis of multiple records. We have used it at our own training at Quantico. We have made a demonstration available to you. I think that it graphically portrays some of our problems with respect to the act.

In one example—and I am shortening these, and it takes a little of the color and the tensions that exist out of it, but I have to do it that way—an informant told us that he was confronted by a convicted felon who showed him a document released to him under the FOIA. The felon accused him of being an informant, and he threatened him, so the informant moved out of the State.

Drug Enforcement Administration agents were attempting to obtain information from a potential informant, and thus far he has refused to be of assistance. He has told the agents that after his own arrest he made an FOIA request and that he identified the informant who was responsible for his arrest. He is afraid that if he cooperates with DEA, anyone arrested will be able to identify him as the informant because he was able to identify his own informant.

A newspaper made a request and received some documents, and it printed a story which contained this sentence: "Though many of the names have been blacked out by FBI offcials, other documents indicate that a Salt Lake City resident"—and I will not list the name here—"was the FBI informat." And they listed the name.

After studying one of our releases, a researcher with detailed knowledge of the subject matter claimed he was able to identify the individuals whose names were deleted. He wrote an article criticizing those who had cooperated with the FBI.

A source spoke to an FBI agent. The source was extremely upset. He said he had received a telephone call from an individual who told him he had just received his FBI file and it identified him—that is, the source—as an FBI informant.

Although we had invoked the confidential source exemption during processing, the individual had somehow identified our source. That is always the problem that we have in the hard line that the statute now takes. We do not know what the requester knows.

Mr. WEBSTER. There is a great potential for human error. For example, in the *Rosenberg* or *Meeropol* case, where the judge ordered us to release documents at the rate of 40,000 documents a month, in that one case—there is bound to be some pressure on time to comply with the statute.

Senator HATCH. Is there any way you can be absolutely sure releasing 40,000 documents a month?

Mr. WEBSTER. No; you really cannot.

There is a certain amount of testing that goes on because of this. There is a lot of conversation in the street about who were the sources of information.

The defendants and suspects in a DEA case included an experienced ex-police officer, a defense attorney specializing in criminal law, and an experienced drug dealer. All were constantly armed and violence prone. The ex-police officer had submitted FOIA requests regularly for a considerable period of time.

As the investigation continued, the attorney and the drug dealer began to submit FOIA requests. The attorney was well aware of

FOIA and the manner in which it can be exploited to determine whether or not there was an ongoing investigation of the suspects and the methods by which an informant could be identified.

Several informants in the case learned that the subjects were submitting frequent FOIA requests. Two became frightened and ceased providing information and fled out of the State. It was a good ploy on their part. All the defendants excaped conviction. They were convicted in a separate case.

You know, you see something like "green sedan," which is something I use in talking to the agents. "Green sedan"—we cannot say that will identify an informat. Out 300 employees who process FOIA requests do not know the person who is requesting the information. They do not know what is significant about a green sedan. So they are supposed to leave it in under the statute.

That is a kind of situation we are confronted with when we have no latitude in a sensitive investigation, such as organized crime, foreign counterintelligence, or terrorism.

Senator DECONCINI. If the Senator would yield, just to follow that up, Director Webster, you are saying that to some people a green sedan whould identify a certain person or a certain informant?

Mr. WEBSTER. Absolutely. He would know.

Senator DECONCINI. It would thereby jeopardize the safety of that person and any continued investigation you were conducting if he were your sole source of information?

Mr. WEBSTER. Exactly.

Senator HATCH. Was that an actual situation, or is that just hypothetical?

Mr. WEBSTER. I think that is a hypothetical one, but you could substitute an address or a geographic location.

Senator HATCH. Was there not one where they just mentioned the sex of a person and that identified the informant?

Mr. WEBSTER. That is right. It is a simple process of elimination.

We have had situations where there were three people at a meeting and two show up as suspects. It does not take much imagination to figure out that the third one, since he was not a suspect in our investigation file, was probably the informant and can be confronted then by the other two or by their agents.

Senator HATCH. Especially if they have a document from the FBI saying that one of the three——

Mr. WEBSTER. That is right. The document just listed two people, and they know that there were three people at that meeting.

Senator HATCH. Yes.

Mr. WEBSTER. In the 95th Congress, Mr. Gary Bowdach, an admitted organized crime figure, testified before Senator Nunn's Government Operations Committee. He testified that he made an FOIA request—and I am quoting—"to try to identify the informants that revealed information to the agencies." Senator Nunn asked him if he wanted their names so that he could murder them. Mr. Bowdach said, "Yes, sir." When asked if this kind of motivation is prevalent with organized crime figures in the penitentiary, Mr. Bowdach responded, "Absolutely."

Bowdach went on to describe how he and other inmates went through about 5 pounds of documents released under FOIA and

through analysis learned that the deletions were not totally complete. He stated that an individual had been identified in this exercise.

That is the same one where I keep hearing about people saying, "Well, they did not identify him enough because they killed the wrong man," because the identification was figuring out how many letters were in the deleted section and it turned out to be a symbol number rather than a name. That does not give me very much comfort, and it certainly does not give our informants very much comfort if the wrong man got murdered.

Col. Clinton Pagano, the superintendent of New Jersey's State Police, wrote to me shortly after Joanne Chesimard escaped from the Clinton County Correctional Institution in November 1979. He did not really wait to write; he picked up the phone to call me, and then he wrote to me.

Chesimard, as I mentioned in my opening statement, was serving a life sentence for the execution-style murder of a New York State trooper. Following her escape, prison authorities found in her cell numerous FBI records acquired by Chesimard under the FOIA. After reviewing these records, Colonel Pagano concluded—and I am quoting him now—

> Our efforts to apprehend this fugitive have been impaired, and the working relationship between the New Jersey State Police and the FBI has suffered accordingly. Without question, Joanne Chesimard has an in-depth knowledge of the procedures of your Agency which she will use to elude apprehension.

Many other people feel the same way about it. I am aware of another case in another part of the country where police officers had important information relative to a foreign counterintelligence investigation and would not give it to us because they did not believe we could protect the source.

Senator HATCH. I take it you had additional information that might have been able to resolve some of the problems.

Mr. WEBSTER. That is right.

Senator HATCH. But you were stymied because of the failure to cooperate on behalf of the local law enforcement people.

Mr. WEBSTER. I have another case in which a man with a long history of felony arrests and convictions has used the act repeatedly in what is obviously a systematic manner to zero in on an informant. I cannot discuss this case in public, because it is too sensitive and the people are still in a position to engage in reprisals.

The systematic elimination would make you realize that this is a ripe target for anyone who likes crossword puzzles or ordinary challenges of analysis to try to take these documents and find the missing link. They have something that we do not have, and that is the extra knowledge. We do not know what the extra knowledge is. In the package of proposals that I submitted in 1979 are just pages and pages in which people in all segments of society refused to provide us with information that they feared could be revealed under the act.

I think one of the saddest experiences that I had in the first year that I came here was with personal calls and telephone calls by Federal judges, all friends of mine, who claimed that they were very sorry but they did not want to be interviewed by FBI agents about candidates for judges to sit on their courts. They said they

had read the act, they understood the act, and they knew that there were going to be these nice line-by-line, word-by-word deletions, that the new candidate had every right to ask for his file under the Privacy Act, and if he was confirmed and got on the bench he would be spending the rest of his life with him, knowing that that particular judge had derogatory comments to make about him. So the judge, rather than put up with that, defaulted in his public responsibility to make us aware of the deficiencies in a judicial candidate.

Senator HATCH. This, of course, makes it very difficult for us here on the Judiciary Committee when we have so many judgeships coming before us constantly.

Mr. WEBSTER. We have to come to you with the best that we have. Sometimes it is not the best, for just this reason. We tell everybody that they have a promise of confidentiality.

Senator DECONCINI. Mr. Chairman, let me just interrupt for a moment with a personal experience along that line under the previous administration. I suggested a nominee for a U.S. Federal court which was not sent up here, but in fact the FBI did a background check on the individual. The individual asked for and gave me information to ask for the file, and I got it.

I noted in reading it that there were Federal judges, prosecutors, and police on both sides of this particular person's information that gave positive information and gave negative information. Their names were crossed out, but if you were familiar with the community, like I was and the proposed nominee, there was no question that it was Judge So-and-So sitting on this court that said this, whether it was for or against the individual. It was a very difficult situation.

Had the man been put on the court, it would have been even worse because one of the people who had derogatory comments happened to be on that court.

Senator HATCH. I have looked at those FBI files, and I have to admit that it is all right there for anybody to see.

Senator DECONCINI. And there is no criticism of the FBI; they were just doing their job. But it certainly was not difficult to figure out who it was.

Mr. WEBSTER. We are just following the statutes and the limitations of the statute in its present form.

We have polled our agents in the field to see what their sense of it is. We took a representative sample of about half of our total population, and 70.3 percent indicated that FOIA had diminished their ability to develop quality informants. You can discount, and others may discount, that type of information, but these are the people who have to develop the informants, and these are the people who are encountering difficulties.

Senator HATCH. What percentage?

Mr. WEBSTER. A year ago, in a random population sample of 4,100 street agents, which is not our total population, 70.3 percent indicated that FOIA was giving them major problems.

Senator HATCH. Is that because of perception that they might be disclosed?

Mr. WEBSTER. I do not think we have any way of quantifying that. It is a combination of both. It is what the prospective infor-

mants, exisiting informants, or former informants tell them about their reasons for not cooperating.

It also represents some knowledge on the part of our agents about limitations of the assurances they can give. As I said before, they do not intend to lie to the informants. Informants want to know straight out, "Can you keep this?" By the time the agent has finished giving the qualifiers, it is not quite as reassuring as it ought to be.

Senator DECONCINI. Do you have other cases?

Mr. WEBSTER. I think one of the other concerns I should mention, since I have the opportunity, is in terms of trying to quantify. There are many cases where we are just not going to hear from somebody saying "You sent us too much information." There are only a few who are going to stand up and say, "Ha ha, we found out with what you sent us."

In hostile intelligence activity in this country. which it is our duty to combat under our foreign counterintelligence responsibilities, it is a cardinal principle of positive intelligence gathering—which is what they are engaged in—that once you identify your informant you leave him in place. Once you know who the assets are, you just leave them there, because you know they are on the other side. So for many of them, there have been no particular reprisals and no particular injury, but they have lost their utility and perhaps are feeding back disinformation to us because they may have been indentified and left in place. That is still another way in which this kind of information affects our ongoing responsibilities.

Senator HATCH. I understand the FBI spends more than $10 million every year processing their FOIA requests. This results, of course, in a great volume of disclosures. For instance, you mentioned that over 60,000 pages were produced just for people in the Weather Underground organization. With this volume of material being processed—and you have to meet process needs on a daily basis—you have expressed to me personally that you have a great concern with human error.

While I am confident that you do everything possible to avoid errors that disclose sensitive matters, even bureaucracies are human. Would this chance for human error justify the administration's request that all terrorism, foreign counterintelligence, and organized crime records be exempt?

Mr. WEBSTER. It is certainly one of the important reasons for doing so. It goes beyond mere protection of informant information; it involves the protection for our sources and our methods, the means by with these long-term ongoing investigations can be protected.

I mentioned earlier that we collect a great deal of data. It is a slow process putting things together, finding our way, and making sense out of bits and pieces of information. If any of that gets out, not just source information, but if any of that gets out, criminal enterprises can take great advantage by sending us down blind alleys, escaping us as we get closer to them, knowing how we operate.

All of those reasons, I think, in addition to protecting the lives of source of information go to giving us special protection in these highly sensitive, crucial areas.

[In response to requests from several of the FBI's oversight committees, Director Webster prepared some proposed amendments to the Freedom of Information Act. With the permission of then Attorney General Bell, he sent them in June 1979, to those committees with oversight responsibilities. The following appeared in the appendix to the FBI's package of proposals.

[The effect of the Freedom of Information Act on DEA Investigations submitted by Francis M. Mullen, Jr., Acting Director, follows Director Websters' material.]

INTRODUCTION

On April 25, 1978, the General Accounting Office (GAO) requested Federal Bureau of Investigation (FBI) participation in a GAO study on the impact of the Freedom of Information Act (FOIA) and the Privacy Act (PA) of 1974 on law enforcement activities. To compile data for the GAO request, the FBI canvassed its Headquarters components and 59 field divisions. The following examples include instances of perceived and/or actual impact reported by FBI field offices and Headquarters divisions in response to the GAO request and subsequent to the GAO study. Examples which involve classified matters are not included.

A. STATE AND MUNICIPAL LAW ENFORCEMENT AGENCIES

An FBI office noted a trend to exclude Agents working organized crime matters from key intelligence meetings in their area. Several state law enforcement officers have mentioned a concern for the security of information in connection with Freedom of Information-Privacy Acts (FOIPA) disclosures as the reason for the closed meetings. The office undertook efforts through meetings with state and local law enforcement agencies to improve their understanding of the FOIA and PA legislation. These efforts have not met with complete success.

*

The Attorney General for a certain state has advised he intends to follow a policy concerning the release of state records to be in conformity with the FOIPA. Consequently, in applicant background investigations, state police arrest records concerning relatives of applicants are not made available to the FBI.

*

Due to the FOIPA, difficulty has been experienced on several occasions in obtaining information from a certain police department. Some officers have stated their reluctance to make information available concerning subjects of local investigation because of these Acts. The organized crime control bureau and the intelligence division of the police department have expressed concern over the FBI's ability to protect sources of information.

*

In a civil rights investigation in which the subject was a former employee of a law enforcement agency, the head of that agency advised subject's personnel file contained several previous complaints concerning his alleged brutality. However, the agency refused to make the personnel file or information contained in it available to the FBI, out of fear the subject would have access to this information under the PA.

*

In a recent civil rights investigation, an effort was made to obtain a copy of a police department report of the victim's death. Local authorities would make the report available for review but declined to provide a copy for inclusion in the FBI's investigative report. Anticipating a civil suit would be filed against the city and police department arising from the victim's death, they questioned the ability of the FBI in view of the FOIA and PA to maintain the local report in confidence.

A representative of a certain police department intelligence division has stated he is very reluctant to furnish information regarding possible domestic revolutionaries. He is fearful such information could inadvertently be released pursuant to the FOIPA.

*

A detective of a prosecutor's office was contacting his local sources relative to the whereabouts of a former resident who was a Federal fugitive charged with murder. The detective said his sources and contacts in the Cuban community were reluctant to provide information in this case or others because of the fear of disclosure under the FOIA.

The following letter was written by the Chief of Police of a major city:

"With respect to FBI files being made accessible to persons or organizations pursuant to the Privacy Act or the Freedom of Information Act, I request that all investigative records of information, from whatever (deleted) Bureau of Police source (including the (deleted) Police Bureau as an organization, its employees, etc.), in your files be protected and kept confidential.

"If such protection cannot be assured to this organization by the FBI, we will only be able to cooperate in the exchange of non-sensitive, non-confidential information. The (deleted) Bureau of Police would not be able to pass on sensitive information to the FBI without this assurance of confidentiality, and the effectiveness of the working relationship between our organizations would be greatly diminished."

*

A chief of police stated in the early part of 1977, that if any information is released by Federal law enforcement agencies as a result of a request under the FOIPA, which indicated that the source of information was his police department, he would no longer allow his department to furnish information to any Federal law enforcement agencies.

*

A representative from the criminal conspiracy section of a certain police department has stated his section is very reluctant to discuss information concerning possible intelligence operations. The representative stated he feared this information could inadvertently be released by the FBI to an individual pursuant to an FOIPA request.

*

In civil rights matters, officers of a certain police department have been cautioned by their departmental attorneys that, when interviewed as subjects by FBI Agents, they should respectfully decline to furnish any information based on the 5th Amendment. They have been cautioned further that any statement they do make to the FBI would be subject to disclosure under the FOIPA.

Two police departments in a certain state will not share their informants and, more importantly, a substantial amount of their informant information on Federal violations, for fear an informant will be disclosed accidentally by the FBI through a request in connection with the FOIPA.

*

It has been observed the exchange of information among local police, state and Federal investigators at the monthly meetings of a police intelligence organization has decreased substantially. Because of uncertainty over what information may meet FOIA or PA disclosure criteria, there is very little information exchanged at these meetings.

*

Since the spring of 1976, a southern office of the FBI has encountered an express reluctance by a police department and a sheriff's office's intelligence unit to cooperate in furnishing written information to the FBI on security, as well as criminal, matters. A member of the intelligence unit stated that, despite past FBI assurances that all intelligence information would be considered confidential, it had been learned a former black activist, who had made an FOIA request to the FBI was furnished a copy of an intelligence report previously furnished to the FBI by the police department. Although this document did not reveal the identity of any informant, that local agency advised it had no choice but to decline to furnish further written information to the FBI, in order to prevent this situation from arising again.

*

In the course of a fugitive investigation, an FBI Agent was denied information contained in city employment records, due to the PA. Subsequently, the Agent was able to obtain these records through a Federal search warrant which was served on City Hall. However, because of delays required to obtain the search warrant, the Agent missed apprehending the fugitive at his place of employment.

B. FOREIGN LIAISON

In recent conversations with two members of a foreign police agency in an investigation concerning copyright matters, these officers stated they did not furnish all information to the FBI as they had in the past, due to the FOIA.

*

On April 11, 1978, an individual who has some contact with foreign police department officers declined to actively assist the FBI because of the fear of seeing his name in the newspapers. He advised the promise of confidentiality by law enforcement in today's political environment is worthless.

*

A citizen who has close contact with a foreign police agency discontinued his association with the FBI because he feared that, under the FOIA, information might be released which would identify either himself or this foreign police agency.

In the past two years, several Agents have had contact with foreign police representatives visiting the United States. These representatives have come from Western countries, some of which have experienced internal problems with terrorism. These police representatives generally offered the observation that, despite their high regard for the reputation and professionalism of the FBI, they believed (one said it was sadly amusing) all of the fine efforts of the FBI are sometimes diluted, if not negated, when the investigative results have to be furnished under the FOIPA to subjects of investigations. This same dismay over restrictions on the FBI was relayed by a person who traveled to another foreign country and visited that country's national police force.

C. ABILITY OF LAW ENFORCEMENT PERSONNEL TO OBTAIN INFORMATION FROM THE GENERAL PUBLIC

1. AIRLINES

In an FBI case an airline company accepted a stolen check for airline passage. As their computers indicated to the ticket agent the check was stolen, the airline refused to issue the ticket which had been completed by the ticket agent. During the course of FBI investigation, the airline was requested to surrender the completed but unused ticket as evidence; however, the company declined to make the ticket available to the FBI due to the FOIPA.

2. BANKS

Citing the PA, a large bank would not make available details of a particular financial transaction without a subpoena, although the bank was the vehicle in a possible 2.2 million dollar fraudulent Interstate Transportation of Stolen Property transaction.

*

A former president of another bank obtained loans using fraudulent financial statements. The former employee's bank would not make available to the FBI the personnel file, the loan file, or the results of the internal audit regarding the president's activities, based on the PA. This information was not available from other sources.

*

During an investigation concerning the disappearance of $1,000 from a bank, investigating Agents contacted a senior vice president to request background information on a particular suspect bank employee. The vice president advised that, due to recent Federal and state privacy legislation, he could not furnish personnel information concerning this employee, as he feared the employee might then have grounds to file a lawsuit for invasion of privacy.

*

In an investigation involving false statements to an estimated 50 to 65 banks resulting in 3.8 million dollars in lawsuits, an FBI office served a subpoena for bank records on a bank and made request to interview bank officers who had been personally contacted by subjects. The bank, a victim of the scheme, would not permit the requested interviews

without additional subpoenas directed to the officers involved. By way of explanation, the bank advised the PA prevented discussion of any information concerning a bank customer without subpoena.

*

A certain bank was the victim in a Bank Fraud and Embezzlement - Conspiracy case. Losses suffered in this case were approximately $476,000. Bank officials advised that under bank policy, which was based on the FOIPA, they would furnish no information to the FBI without a subpoena duces tecum.

3. HOSPITALS AND PHYSICIANS

In an applicant investigation a waiver was provided the FBI to obtain medical records concerning hospitalization at the health center of an educational institution. The school physician refused to provide any information either to the FBI or to the applicant, even after the latter personally went to the health center to sign a second waiver drawn by the school. The office of the school president advised refusal to release information was due to the PA.

*

An individual identified as operating a check-kite scheme with banks in several states had been hospitalized. Investigation determined this individual had initiated his check-kite scheme from a hospital telephone. Nevertheless, hospital officials, citing the FOIPA, refused to verify his hospitalization or dates of confinement.

*

In a fugitive case, an FBI Agent attempted to obtain background data on the fugitive from a private hospital where he had been a former patient. Hospital officials expressed the belief that Federal privacy law inhibited them from verifying the subject's status as a former patient, much less releasing background information on him.

4. HOTELS

A hotel which is a part of a large nationwide hotel chain refused to furnish information on guests, including foreign visitors, without a subpoena due to the enactment of the FOIPA.

*

During a fugitive investigation of a subject wanted by Federal and local authorities for extortion and firearms violations, an Agent contacted the security officer at a hotel. The purpose of this contact was to develop background information on a former employee of the hotel, an associate of the fugitive, who had knowledge of the fugitive's current whereabouts. Security officials at the hotel refused to furnish any information from their files without a subpoena because they felt they were open to civil litigation under the provisions of the PA.

Numerous hotels and gambling casinos in the State of Nevada, which would formerly furnish information from their records on hotel guests and gambling customers during routine investigations, now require a subpoena before they will release any information to the FBI. The reason given by hotel officials is for hotel protection, in the event of a lawsuit following an FOIPA release to these subjects of investigation.

5. INSURANCE COMPANIES

Information submitted to Medicare through an insurance company, which would show Medicare fraud perpetrated by the staff of a hospital, was withheld by the company, citing the PA. It was necessary to obtain a Federal Grand Jury subpoena for the desired information.

*

In the field of arson investigations, major insurance companies and the Fire Marshal Reporting Service have stated they will provide no information to Federal law enforcement agencies except under subpoena. They advise their legal departments believe this position is necessary for protection against civil suit, in the event of an FOIPA disclosure.

*

In a Racketeer Influenced and Corrupt Organizations investigation involving numerous subjects in an arson-for-profit scheme in which insurance companies are defrauded after the insured property is burned, at least 15 insurance companies, numerous insurance claims adjusting firms, and insurance agents have refused or have been most reluctant to furnish files regarding losses and coverage because of the universal fear that the information furnished could be obtained by the insured in an FOIPA disclosure which the insured might use against the insurance company or firm in a civil suit. FBI recourse has been the obtaining of Federal Grand Jury subpoenas to obtain the desired information, which in every instance caused delay in the investigation. Many of these firms cited widespread news publicity resulting from FOIPA disclosures as cause for their total lack of confidence in the FBI maintaining any information confidential.

6. LEGAL PROFESSION

On May 5, 1977, a nationally known U. S. District Court judge refused to be interviewed on an applicant matter because he wanted any information furnished about the applicant to remain confidential. It was the judge's opinion the FBI could not prevent disclosure of this information at a later date to the applicant under the PA.

*

In response to an FBI inquiry concerning an applicant, a former Assistant United States Attorney (AUSA) confided that significant information, meaningful and derogatory, would not be forthcoming concerning the applicant because of the FOIPA. When pressed by the FBI Agents upon this point, the former AUSA stated that he would counsel his clients not to furnish the FBI with derogatory information in applicant-suitability matters.

*

During an investigation in March, 1978, by a mid-western FBI office, private attorneys were interviewed concerning the qualifications of a candidate for a Government position. These private attorneys initially declined to furnish derogatory information in their possession concerning the candidate, in view of the provisions of the PA. They did furnish pertinent information on a promise of confidentiality, and it is unknown what information they withheld due to fear of the effect of the PA.

*

A Federal district judge was interviewed in a background investigation concerning a departmental applicant. The judge stated he did not feel that the FBI could provide confidentiality concerning his statements. He declined to furnish candid comments concerning the applicant and stated he did not wish to be interviewed concerning any FBI applicant investigations in the future.

*

A prominent attorney was contacted concerning an applicant. He indicated he was in a position to furnish uncomplimentary information concerning the applicant, but advised the interviewing Agent that due to the FOIPA he would not do so. Thereupon, he furnished a brief, neutral commentary.

*

In connection with a suitability investigation concerning a nominee for U. S. district judge, two attorneys contacted in July, 1976, expressed extreme reluctance to furnish their true opinion regarding the qualifications of the candidate. They indicated they were fearful that, should the candidate be appointed to a judgeship and later learn of their statements, he would find a way to punish them professionally through his position. The attorneys eventually provided their comments after receiving an express promise of confidentiality; however, there is no assurance that they were as candid as they might have been.

*

In a recent background investigation conducted pertaining to a Federal judgeship, one attorney contacted advised he had derogatory information concerning the judicial candidate. However, he declined to furnish this information to the FBI stating he felt the information would eventually be disclosed to the applicant under the PA. He felt that, if this disclosure ever occurred, he would be unable to practice before the applicant's court.

7. NEWSPAPERS

In a Corruption of Public Officials case, consideration was being given for change of venue to another city. The local FBI office was requested to review newspaper clipping files to determine the amount of publicity the corruption matter had received. On April 10, 1978, a newspaper editor advised that, in light of the FOIPA, no information from newspaper clipping files would be made available to the FBI except upon service of a subpoena.

8. POLITICIANS

Recently in a southern state, the state chairman on one of the state's two major political parties was interviewed regarding a presidential appointment. This individual was advised of the provisions of the PA at the outset of the interview and requested confidentiality. He made one or two statements of a derogatory nature and then requested that these statements be disregarded. He advised that, although he was aware his identity could be protected under the PA, he was not confident this protection would be effective. After the above statement, the interviewee would provide only a general statement regarding the appointee's honesty and terminated the interview.

*

In a southwestern state, a highly placed political figure offered to furnish information to the FBI concerning a multimillion dollar act of political corruption. The information was never received because the Agent could not guarantee that his identity would not later be inadvertently disclosed through sophisticated querries sent to the FBI through the FOIA. This source feared that the adversary in this matter could collect pieces of information from the FBI through the FOIA, then assemble the information, possibly using a computer and identify the source.

*

During the course of a public corruption investigation, the interviewing Agent in a southern office detected reluctance of witness police officers to provide complete information, subsequent to a discussion of the FOIPA. It was the opinion of the interviewing Agent this reluctance was based on apprehension by the police officers this information could be made available to the subject, a trial judge before whom the police officers frequently appeared.

9. PRIVATE COMPANIES

During a routine investigation, a Special Agent sought the cooperation of a company personnel manager to determine the subject employee's residence from company records. Citing the restrictions of the PA, the personnel manager would neither confirm the subject's employment with his company nor provide any background information.

*

During a recent national security investigation involving a possible Foreign Agents Registration Act violation, a lead was set out to interview the owner of an electronics firm regarding the purchase of loudspeakers and other electronics used by foreign nationals in a public demonstration. The owner of the electronics firm refused to disclose this information unless a subpoena was issued, stating he feared the customers who rented his equipment might learn of his cooperation, under the FOIPA, and bring a civil action against the electronics firm for breach of confidentiality.

*

In connection with bank fraud matters being investigated in a certain city, an auto dealer refused to furnish time cards of employees because he would violate the PA.

Because of the FOIPA, the policy of an oil company limits the type and amount of information that the company will provide to the FBI regarding an applicant for employment. The personnel clerk for that company advised that, even when an applicant has executed a waiver form, the only information the company will furnish regarding the applicant's employment is as follows: verification of employment, dates of employment, position and salary.

*

During the course of an investigation, Agents sought to review employment records at a department store and were advised that employment records were no longer available because of the PA. Agents also attempted to secure information concerning the subject from two other stores and were advised that this information was not available without a court subpoena.

*

In an investigative matter regarding an electronics company, a former employee of the company, who was a principal witness, became fearful that he would be sued by the subjects of the investigation and the company if he provided information to the FBI. He was reluctant because he believed this information would be available through the FOIPA; if the criminal allegation was not ultimately resolved in court, he feared he would become civilly liable. On several occasions, this witness asked what his civil liability would be and expressed reluctance in providing information of value to the investigating Agent.

*

Another investigative matter was based on information furnished by businessmen in a small town. When they initially furnished the information, these sources asked that they not be called upon to testify. Being businessmen in a small town, they expressed fear the information they provided would be used against them and harm their businesses. When these sources learned information which they furnished might be obtained through the provisions of the FOIPA by the investigation subjects, they stated they would not furnish any further information to the FBI.

*

In a fugitive investigation, information was developed that the subject was a former employee of an oil company. When contacted, the oil company management declined to furnish any background information from their personnel files concerning subject's former employment. The stated reason for not furnishing this information was concern for possible future company liability should the fact of FBI cooperation become known to the subject under the FOIPA.

10. PRIVATE LENDING COMPANIES

An Equal Credit Opportunity Act case involved a limited investigation based on a Department of Justice memorandum which directed that 14 former employees of a loan company be identified and interviewed. Citing the PA, the loan company's legal counsel declined to identify to the FBI the 14 former employees. Instead, he had his current employees make personal contact with these 14 individuals to request their permission to release their names to the FBI.

This indirect process delayed the investigation for a one-week period. The company was also asked to release loan applications of certain individuals who had been granted loans within the past 18 months. On the basis of the PA, the loan company declined to release these financial documents.

11. PUBLIC UTILITIES

During a recent security investigation, a lead was set forth requesting utility checks to be made to obtain information regarding certain individuals. Officials of a utility were contacted and advised that checks of their records would not be possible due to the provisions of the PA.

*

A local security office of a telephone company referred an illegal telephone call case to an FBI resident agency. However, the company refused to furnish any data concerning the principals involved in the violation without a subpoena for telephone company records.

*

In a fugitive investigation, an FBI office was given reliable information concerning the nonpublished telephone number of the fugitive's location on the Christmas holiday. The FBI holiday supervisor tried in vain to obtain the location of the number from various officials at the telephone company and the fugitive was not apprehended. The company insisted a subpoena was needed, based on FOIPA considerations, before this type of information could be released to the FBI.

12. QUASI-LAW ENFORCEMENT

The disciplinary board of a state supreme court advised that, because of FOIPA considerations, all requests for information by the FBI must be in letter form and a release authorization signed by the applicant must be enclosed with the request letter. It was intimated that a written request might not elicit all information if the disclosure could cause difficulties for the board.

*

An association will no longer provide any information to law enforcement agencies or investigators unless served with a subpoena. This association has in the past assisted the FBI in coverage of aspects of the racing industry. The association has advised its current restrictive policy is the direct result of FOIPA legislation.

13. TRAVELER'S AID

A kidnapping case involved a 65-year-old victim who had been brutally beaten, stabbed and left for dead in a rural area of one state. The victim could only provide nicknames for the kidnappers. Investigation revealed that the subjects had attempted to gain transportation from the Traveler's Aid Society. The Society, after being advised of the urgency of the matter, nevertheless refused to supply information on December 20, 1977, from records which would identify one of the subjects and possibly reveal the where-

abouts of both subjects. This information was subsequently obtained the next day by subpoena duces tecum and teletyped to an FBI office within a few hours after receipt. Both subjects were arrested in another state on December 26, 1977. However, a few hours prior to the arrest, one subject shot and killed an individual in that other state.

14. UNIONS

On alleged privacy grounds, an international union will no longer provide information to law enforcement agencies unless served with a subpoena.

*

During the course of a Racketeer Influenced Corrupt Organizations case involving certain union members and company officials, the investigating Agent contacted nonunion employees concerning alleged harassment by union members and the firing of several rifle shots at nonunion members. A prospective witness to a particular incident declined to furnish any information to the FBI, on FOIPA grounds, stating that, "the Government just can't keep a secret anymore."

*

In a similar FBI case, a labor union official refused to furnish information to the FBI. He claimed he would have no confidence in the security of his information in view of the ability of individuals to obtain their files under the FOIPA.

15. WESTERN UNION

During the course of an investigation to locate and apprehend a fugitive, a Special Agent and a cooperating witness attempted to obtain information from a Western Union office, concerning a telegraph money order and message sent to the cooperating witness from the subject. Employees at the Western Union Company advised they could not disclose any information regarding the money order or message, due to "privacy concerns," without a court order.

16. MISCELLANEOUS

In an investigation regarding an escaped Federal prisoner, a man telephoned an FBI office and advised he knew the location of the fugitive. The caller stated he was concerned that the fugitive would find and kill him if he furnished the FBI the information. The caller was given assurances that his identity and any information he gave would be considered confidential. The caller refused to give his name, specifically stating, "I know about the FOIA. Anything I tell you guys will get back to him." When asked the location of the fugitive, the caller stated he was in a motel on a certain street and then hung up the phone. After contacting numerous motels on that street, the fugitive was located and apprehended.

*

In a bank robbery investigation a high school student was identified as a suspect. When officials at the high school were approached in an attempt to obtain necessary information concerning the suspect (descriptive data, address, whereabouts, etc.), the officials declined

to furnish the information due to the FOIPA. After the loss of precious time, the school principal was finally convinced that the student posed a threat to the community, in view of the fact he was armed and probably desperate. He eventually provided the information and the student was arrested.

*

During the course of another bank robbery investigation a warrant was obtained for a female subject. The investigation determined the subject had applied for a job through the state unemployment office. That office refused to provide any information, advising it was protected by state and Federal privacy acts. It was necessary to obtain a subpoena to force the unemployment office to disclose the requested information. During the period of time between the service of the subpoena and its return, the subject committed another bank robbery. The FBI believes that if the information had been disclosed at an earlier time, the second bank robbery would not have occurred, as the subject would have been arrested more promptly.

*

One FBI office received information from an AUSA indicating a woman had information concerning ghost employees and other frauds within the Comprehensive Employment and Training Act (CETA) program. When contacted, the woman refused to be interviewed because she feared that her identity might be disclosed through an FOIPA request.

*

Two individuals in a position to furnish important information regarding a series of train wrecks refused to do so because they feared the FOIA would force the FBI to reveal their identities. This attitude existed even after assurances were given by the Agents regarding the FOIA.

D. IMPACT ON CURRENT INFORMANTS OR POTENTIAL INFORMANTS RESULTING FROM PRESENT FOIPA DISCLOSURE POLICIES

Three individuals were separately contacted in an effort to obtain their cooperation in organized crime matters. Each of these individuals advised the contacting Agent they felt their confidentiality could not be maintained due to current FOIA legislation. It is believed these individuals would have been cooperative had they not feared the FOIA and they would have been valuable FBI informants. Because of the wide publicity which the FOIA has received, these individuals were well aware of the public's ability to gain access to information in FBI files.

*

Shortly after a skyjacking began, an unidentified caller stated to a Special Agent that he was a medical doctor and that the skyjacker was probably identical to an individual who was an outpatient at the psychiatric clinic where the caller was employed. He stated the individual was schizophrenic and was dangerous to himself and to other persons. The caller suggested that a psychiatrist should be available during all negotiations with the skyjacker. The caller's identity was requested since he was obviously

knowledgeable concerning the skyjacker and could furnish possible valuable information in an attempt to have the skyjacker peacefully surrender. Despite the fact that several lives were in jeopardy, the caller stressed that he was unable to furnish his name because of FOIPA requirements and terminated the call. Because of this telephone call, the FBI did have a psychiatrist available during negotiations with the skyjacker (who had been correctly identified by the caller) and the skyjacker's surrender was accomplished without loss of lives or property.

*

For approximately three years, a telephone caller known to the FBI Agent only by a code name furnished information in a wide variety of cases, from drug-related matters to terrorism. The caller never identified himself and advised he could never testify since to do so would risk death. The caller finally terminated his relationship, expressing fear that an inadvertent release of information by the FBI, under the FOIA, might identify him.

*

An individual in a position to know information about an FBI subject stated to a Special Agent that she would not furnish any information lest it and her identity appear in the newspapers. She made reference to information which was being published in the press as a result of an FOIPA request.

*

An Agent was recently in contact with an individual believed capable of providing reliable direct and indirect information regarding high-level political corruption. This individual advised his information would be furnished only if the contacting Special Agent could guarantee that the individual's identity would never be set forth in any FBI files. The contacting Agent attributed this individual's reluctance to have his identity set forth in FBI files to a fear of the FOIPA and its effect on the FBI's ability to maintain confidentiality of information from informants.

*

In August, 1976, an FBI field office contacted a source to determine why he was not now providing the FBI with information as he had been in the past. This source replied that he was in fear of losing his job and of retaliation by individuals about whom he might furnish information. The source asked if the FBI could guarantee the confidentiality of his relationship and of the information he furnished. He stated he was particularly concerned about confidentiality in light of the FOIA. In view of his apprehensions, this individual is no longer being contacted by the FBI.

*

A particular organized crime case involved an investigation to identify male juveniles being transported interstate for homosexual activity. Due to fear of reprisals stemming from FOIA disclosures and PA problems, various school officials would not cooperate in the investigation to verify the identity of the juveniles. In the same case, prominent citizens in a community displayed reluctant cooperation with the FBI out of fear of FOIA disclosure.

A potential source advised he would not cooperate with the FBI due to fear his identity would be publicly revealed, which would be detrimental to his profession. This potential source referred to news accounts in the local press regarding material made available under the FOIA, which had disclosed the names of several individuals in professional capacities who had assisted the FBI and the nature of their assistance. This type of publicity, according to the potential source, would be detrimental to any individual in business who elected to cooperate with the FBI.

*

A Special Agent advised that an individual in a high management position in a state agency wished to provide information to the FBI on a confidential basis. During one of the Agent's initial conversations with this source, confidentiality was requested, specifically that the source's name never be mentioned in FBI files due to "past legislation, FOIPA, etc." This person was in a position to furnish information concerning white-collar crime and political corruption; however, the potential source subsequently refused to cooperate with the FBI, in spite of the Agent's assurances.

*

An FBI office has had success in developing a number of valuable informants from a group of loanshark victims. Recently, upon interview, several of these individuals stated a desire to cooperate, but have refused to do so for fear of the subjects of the investigation learning their identities through an FOIPA release.

*

A criminal informant, who furnished very significant information in an automobile theft ring case, advised he feared for his life after reading in various newspapers of disclosures made under the FOIPA. As a result, this source will no longer furnish information which is singular in nature.

*

Several attempts have been made to reactivate a former source, who had been extremely cooperative and productive. Current attempts to persuade the source to once again aid the FBI have been negative. The former informant refuses to cooperate, as he believes his identity cannot be kept secure due to FOIPA disclosure policy.

*

An informant was recently closed inasmuch as the source advised he believed the FBI could not efficiently protect the confidentiality of his relationship and his identity, due to the FOIPA. This source has previously provided excellent information regarding gambling and organized crime. He stated that he is afraid, if his name ever surfaced as providing information to the FBI, he would lose his business and everything he has worked for in his life.

*

In 1976, an active informant stated he would no longer continue in that capacity because it was his belief,

as a result of the FOIPA, his identity and confidentiality could no longer be protected.

*

In an Interstate Transportation In Aid of Racketeering investigation, an individual was successfully developed as a potential source of information concerning racketeering and political corruption. However, upon learning of the provisions of the FOIPA, this individual requested that his conversations not be recorded and refused further cooperation.

*

Another field office informant related a conversation which occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI will be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected the provisions of the FOIPA would be successfully utilized in identifying FBI informants. Agents subsequently contacting this valuable source have noted a subtle reluctance on his part to more fully penetrate the particular organized crime activities which he is in a position to cover.

*

An FBI office in a major city has received information from several reliable informants that most organized crime members in the area have been instructed to write to FBI Headquarters requesting file information pertaining to themselves. These informants have advised the sole purpose of this process is to attempt to identify informants who have supplied information to the FBI on organized crime matters. Requests have been submitted by virtually every organized crime figure in the area.

*

An informant who has a great deal of knowledge concerning a violent group is reluctant to furnish information on the gang because of the FOIPA. He has considerably reduced the amount of information he furnishes to the FBI.

*

An informant who has furnished considerable information concerning a terrorist organization advised that he is very upset about the FOIA. He has learned through conversations that former and current extremists are writing to FBI Headquarters under the FOIA in an effort to identify and expose informants. The informant indicated he is apprehensive about the Bureau's ability to properly safeguard information furnished by him.

*

A long-time confidential informant stated, "I can't help you any more due to the Freedom of Information Act." This informant had previously furnished valuable information which led to arrests and recovery of Government property. Even though the promise of confidentiality was explained to the informant, he still refused to furnish further information.

A former informant regularly furnished information resulting in recovery of large amounts of stolen Government property and the arrest and conviction of several subjects. In a pending case, the former informant refused to cooperate because of his fear of the FOIPA, which he felt would in fact jeopardize his life should he continue cooperating with the FBI.

*

In January, 1978, an office of the FBI received information one prime bombing suspect was applying under the FOIA for his file. Sources close to the suspect advised he was seeking to discover the FBI's knowledge of his activities and the identities of Agents who were investigating him.

*

In a western field office, a former highly productive confidential informant advised that he did not feel secure, due to widespread publicity concerning FBI informants and the FOIA legislation. He stated that, although he continued to maintain his confidentiality regarding his relationship with the FBI, he was not sure that the FBI could do the same. Due to this source's feelings, he discontinued all contact with the FBI.

*

An informant furnished information concerning organized crime figures and on organized crime conditions. Subsequently, the source acquired the conviction that no guarantee could be given that his identity would be protected. Accordingly, the source declined to furnish any further information to the FBI.

*

The Drug Enforcement Administration (DEA) was advised that an informant of one FBI office might be in a position to provide timely information concerning large narcotics shipments, in exchange for a reward from DEA and the guarantee of confidentiality. A local representative of DEA responded that confidentiality could be guaranteed by DEA only in instances where the informant was operated by DEA as a source. DEA reward money could be paid to any individual supplying information; however, the true identity of an FBI source would be reflected in DEA records for such payment. The FBI source was advised of the results of the inquiry with the DEA. The source subsequently furnished the identities of the drug subjects of which he had knowledge. This information was disseminated to DEA. However, the source declined to have further contact with these subjects, for fear his identity would be made known at some later date under an FOIA request to DEA.

*

An FBI informant is well connected to the organized crime element. Over the past year the informant's productivity has dramatically decreased. Consequently, this decrease was discussed with the informant, who stated that he had begun to doubt the FBI's ability to protect the contents of its own files and information provided by its informants. He had learned that an organized crime figure had received over 300 pages of FBI documents and was unquestionably trying to identify informants.

The criminal informant coordinator of a northeast office has been told by an individual, who would potentially be an excellent source of criminal information on the waterfront, that even though he had cooperated with law enforcement personnel in the past he would never do so again. He stated that he was afraid that one day, as the result of FOIPA, he might "see his name in the newspaper."

•

An informant who has been furnishing information to Special Agents of the FBI since 1953, regarding gambling, prostitution, stolen goods, and criminal intelligence information, when last contacted by an Agent, indicated he would no longer furnish any information to the FBI due to the fact it could be disclosed under the FOIPA. The informant felt his personal safety could be jeopardized by the disclosure of his identity, and he no longer wanted to take the personal risk and provide information regarding criminal activities.

•

An organized crime informant has expressed great concern over his safety due to the recent disclosure of information released under the FOIPA. A Special Agent has advised that he believes the informant will terminate his relationship with the FBI because of his concern.

•

A confidential source stated he was fearful his name would become known to certain individuals. He cited their possible access through FOIPA requests to the information he has provided. The source became unproductive and contact with him was discontinued.

•

A confidential source advised that "general street talk" was that one should not provide information to the Government since this information would eventually be publicized as a result of the FOIPA.

•

A long-time informant announced that he felt his confidentiality could no longer be guaranteed and refused to furnish further information. Provisions of the FOIPA were explained to the informant, particularly relating to disclosure of informants and informants' information; however, this informant still wishes to sever contacts with the FBI.

•

Agents recently contacted a former criminal informant who associated with several individuals currently under investigation. The source, who displayed knowledge of the FOIA, expressed extreme concern of the disclosure provisions. The two Agents spent approximately one-half hour discussing this with the source. Both Agents were of the opinion that the FOIA prevented them from obtaining details of value.

•

An asset advised that, while talking with an individual who is a known intelligence officer of a foreign

country, he was advised that certain officials of that country were using the FOIA law to obtain information from the files of the FBI and other agencies through intermediaries. The official expressed some humor over the fact that such information is available.

*

An individual, who is in a position to furnish possible foreign counterintelligence information, expressed the opinion the Federal Government could not protect his identity in view of the constant scrutiny by Congress of the FBI and CIA and the subsequent news media leaks. This individual also stated he would be fearful that his identity would be revealed through access to records by the public under the FOIA, as well as extensive civil discovery proceedings exemplified by the Socialist Workers Party civil lawsuit. In addition, this individual expressed concern over former intelligence agency officers who were publishing books, possibly jeopardizing the confidentiality of sources.

*

In another FBI security investigation, an individual was located who was in a unique position to act as an operational asset in foreign counterintelligence activities. While willing to assist the U. S. Government for patriotic reasons, this individual felt his identity might be revealed under the FOIPA. He therefore felt compelled to report a pending highly sensitive undercover operation concerning national security to his employment supervisors, thereby jeopardizing that most sensitive operation.

*

An informant expressed deep concern over security and possible disclosure of his relationship with the FBI, noting recent instances in which FBI sources had been identified in the press. The informant, who had provided critical information for many years in matters of the highest sensitivity, requested that his relationship with the FBI be terminated and that his name be deleted from the FBI records.

*

One informant is a well-known and highly respected individual with many dealings with certain foreign countries. The informant has repeatedly voiced concern over possible disclosure of his identity through the FOIA. The source has now requested that all contacts be minimized in frequency and duration, that all information furnished be paraphrased, that his real or code names never be used, and that access to his information be severely restricted within the FBI. It has become apparent also, that while the informant's dealings with certain foreigners are known to have increased, the frequency of his FBI contacts, the length of these contacts, and the amount of substantive information furnished have declined.

*

A former source of excellent quality was recontacted, since his background was such that he could develop information of value concerning a terrorist group. After three hours of conversation, the former source agreed to cooperate with the FBI but only in a very limited manner. He stated that due to the FOIA he no longer believes that

FBI Agents can assure his complete protection. He made it clear that he will never again function as he had previously in behalf of the FBI, noting that disclosure of his identity would most assuredly cost him his life.

•

An individual who has requested his identity be protected and who has provided information pertinent to a suspected foreign government intelligence officer, has also expressed concern pertinent to revelation of his identity as furnishing information to the FBI. This individual querried the Special Agent involved in the investigation as to whether his identity could be protected and stated that he was concerned because of future business dealings with certain foreign countries. He felt that should his identity become known to foreign government officials, it would cause damage to his business relationships. Because of the above, this individual stated that he did not wish to be contacted on a regular basis by the FBI.

•

In September, 1977, a former Special Agent advised an FBI Agent that an informant had contacted him upon learning that an FBI subject had obtained documents under the FOIPA. The informant expressed the fear that his identity as a confidential source against this subject would be revealed. This subject was trying to identify individuals who had provided information to the FBI concerning his activities.

•

In a western FBI office, an individual was contacted in a recent foreign counterintelligence investigation, as he was in a position to furnish valuable information on a continuing basis regarding the subject. Although this potential source displayed an otherwise cooperative attitude, he stated he would not furnish information for fear his identity might be revealed at some future date due to provisions of the FOIA.

•

Members of an organization dedicated to bringing about a movement based on Marxism-Leninism, recently discussed the FOIA. A decision was reached to direct inquiries to both the FBI and the CIA under provisions of the FOIA requesting information concerning the organization. It was anticipated that a comparison of information concerning individuals, including dates, times and activities, would identify informants in the organization.

•

In 1976, a most valuable and productive FBI informant ceased his activity in behalf of the Bureau. His reason for this decision was his concern over the FOIA, which he believed offered the distinct possibility of disclosing his identity as an informant. This source provided coverage on two major subversive- and/or violence-oriented groups of investigative interest.

•

Recently an informant, who is furnishing information regarding certain foreign visitors to the

United States, expressed great concern over the possibility of his identity being disclosed. The source stated that he recently read in a local newspaper that foreign visitors could gain access to FBI records through the FOIPA.

*

A businessman was being approached by an intelligence officer of a foreign government. Upon interview by the FBI, the asset stated that were it not for the FOIPA, he would be willing to be operated against this and other hostile intelligence officers. However, because of FOIPA, he felt a real danger that his identity would be divulged which would in turn seriously and detrimentally effect his business overseas. For this reason, asset has refused to become involved in a foreign counterintelligence operation.

*

Since the advent of the FOIPA, numerous documents containing information furnished by an FBI asset of long-standing have been released under provisions of these laws. These releases have had a deleterious effect upon an asset's relationship with the FBI. There has been a noticeable decrease in the volume of information furnished by the asset, who has been frank to state that he no longer has his former confidence that the FBI can maintain the confidentiality of his relationship. On numerous occasions, the asset has expressed reluctance to furnish information which he fears might be released under the FOIA, resulting in his physical jeopardy or leaving him open to civil suit. This asset has not yet terminated his relationship with the FBI, but the relationship is now a very tenuous one.

*

A source who previously furnished information on a timely basis relating to foreign terrorist activities has expressed reluctance to furnish additional information because of the possibility of his identity being exposed due to the FOIPA.

*

A southwestern confidential source, who is in a position to furnish information concerning Middle East terrorist matters, advised that he did not desire to continue contact with any representative of the FBI or to furnish information because of fears that his assistance might become known. The source stated that his concern was due to various media articles relating to actual or potential FOIPA disclosure of information furnished confidentially to law enforcement agencies.

*

An informant of one FBI office has expressed concern that individuals about whom he was providing information were requesting their FBI files under the FOIPA. This informant expressed fear for his personal safety and that of his family. This source had in the past provided reliable and corroborating information about individuals who have been convicted of Federal crimes. There has been a recent reduction in amount and quality of the source's information.

On several occasions in the recent past, an informant voiced his concern for his safety out of fear that his identity would in the future be revealed under the FOIPA. He stated that when he began assisting the FBI it was his understanding that his identity and the information he furnished would always remain confidential.

E. MISCELLANEOUS (OTHER RELEVANT EXAMPLES)

1. SUITABILITY INVESTIGATIONS

In an applicant investigation, an official of a police department refused to be candid in his remarks pertaining to the applicant in view of the FOIPA.

*

In a recent applicant case, a source expressed concern less he be identified as the provider of derogatory information. He clearly indicated he was aware that the applicant would have access to this information through the PA. Other officers interviewed simply refused to be candid regarding the applicant, due to their awareness that the information might be released to him.

*

In a suitability investigation, a local police department refused to make a record check on the applicant's brother without a waiver from the brother, because it was believed there was a possible PA violation.

*

Special Agents have recently observed a general reluctance by local law enforcement officers to furnish derogatory hearsay information in suitability investigations. Members of the law enforcement community have been apprised of the access and disclosure provisions of the FOIPA.

*

A former high official of one city was being considered for a White House staff position. An individual in that municipality refused to comment since he believed the candidate would be able to obtain this information through the PA. The official, who was aware of the Act's provisions, stated he still believed someone in the White House would have access to comments made.

*

During a 1976 Special Inquiry investigation in one city, the interviewee advised he was a business competitor acquainted with the appointee. He inquired as to what degree of confidentiality could be provided if he furnished information regarding the appointee. The PA provisions were explained to the interviewee. This was not a sufficient degree of confidentiality and he would have nothing to say about the appointee.

During the same investigation, a police officer advised he had derogatory background information concerning the appointee. He said he did not want to "go on record" with the FBI concerning this information in view of the PA. He stated that he considered the information so pertinent that it required his direct contact with the Congressional Committee, which had requested the investigation. After receiving the officer's information, the Committee requested the FBI to discontinue the suitability investigation.

2. LAWSUITS

A $600,000 civil suit was filed by a Honolulu plaintiff against a neighbor regarding derogatory information provided the FBI approximately 20 years ago concerning the plaintiff in a suitability investigation. The FOIPA request made by the plaintiff allegedly had enabled her to identify the defendant as the source of the derogatory information, which she claimed in her lawsuit was defamatory. The civil action required the defendant to retain private counsel at great personal expense and resulted in personal trauma. The defendant's retained counsel was successful in obtaining dismissal of the suit on the technical defense of "Statute of Limitations." The primary issue of whether or not a person could sue an individual who had provided information to the FBI was not addressed.

*

In early 1978, an employer contacted one FBI office concerning certain derogatory information furnished in 1967, on an employee who was then seeking a position with the White House staff. This individual, who has subsequently made a PA request to the FBI, determined that the former employer had provided derogatory information concerning her, and threatened to sue the employer if correction of this information was not forwarded to the FBI. The employer's written retraction of the previous information was subsequently submitted to the FBI.

*

An unsuccessful applicant for the position of Federal Bankruptcy judge obtained his file under the FOIPA. He subsequently decided that several former employers and law partners had furnished derogatory information to the FBI concerning him. He filed civil suit against these former employers and law partners and also filed an FOIPA civil suit against the FBI.

*

A subject found guilty in a criminal case, subsequently filed a civil action against witnesses who testified against him in that matter. He made several FOIPA requests to discover the identities of additional witnesses whom he may join in his civil suit.

Documented Examples of the Adverse Effects of the Freedom of Information Act and Privacy Act on Law Enforcement

A. Terrorism

1. A former FBI informant who had provided accurate and useful information in the past was recontacted because his background indicated that he could develop valuable information concerning a terrorist group. Initially, the prospective informant refused to cooperate for fear that through a Freedom of Information Act ("FOIA") disclosure his identity could eventually be revealed. He believed his information would be of such quality that anyone reading it would easily be able to identify him. He was reminded that he had functioned as a valued source for several years and that his identity had never been disclosed. He acknowledged this was true, but added that due to FOIA he no longer believed that FBI agents could assure his complete protection, even if they made every effort to do so. The source also cited recent court cases, particularly the Socialist Workers Party lawsuit, which convinced him that his identity could not be protected. After three hours of conversation, the former source agreed to cooperate but only in a very limited way. He made it clear he would never again function as extensively as before because of FOIA, similar laws, and court decisions. He added that disclosure of his identity would cost him his life. GAO 7.1/

2. Between 1975 and 1981, the FBI released under the FOIA over 60,000 pages of documents concerning the Weather Underground to a West Coast attorney representing members of the organization. In that same period, over 70 members of the Weather Underground made FOIA requests of the FBI. Five of the Weather Underground members charged with the killings of a Brinks' guard and two police officers during commission of an armored car robbery in Rockland County, New York made FOIA requests of the FBI for documents concerning themselves, and four of these people received documents from the FBI pursuant to the FOIA. At least two of these individuals sued the FBI to obtain the release of even more documents. DOJ 9-10.

3. A confidential source in the southwestern United States, who was in a position to furnish information concerning Middle East terrorist matters, advised that he did not desire to remain in contact with any representatives of the FBI or to furnish information because he feared that his assistance might become known. The source stated that his concern was due to various media articles relating to actual or potential FOIA or Privacy Act ("PA") disclosure of information furnished confidentially to law enforcement agencies. FBI 29.

4. An informant who had furnished considerable information concerning a terrorist organization advised that he was very upset about the FOIA. He had learned through conversations that former and current extremists have made FOIA requests in an effort to identify and expose informants. The informant indicated he was apprehensive about the Bureau's ability to properly safeguard information he furnished. FBI 22.

1/ For purposes of citation, the following abbreviations are used: GAO = Comptroller General, Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies(1978); FBI = Federal Bureau of Investigation, FBI Proposals to Amend the Freedom of Information Act, Appendix, Survey of Impact of the Freedom of Information Act (FOIA) and Privacy Act (PA) on Law Enforcement Activities; DEA = Letter, dated June 13, 1979, from R. Aruslan to R. Saloshin; OLP = Memorandum, dated September 21, 1981 from DEA Acting Administrator Francis M. Mullen, Jr. to Assistant Attorney General Jonathan Rose; DOJ = Submission, dated December 11, 1981, from FBI to Senate Judiciary Committee, Subcommittee on the Constitution.

5. A person involved within an extremely violent terrorist network who suspected that there were government informants within the group stated that, in order to identify the informants, multiple FOIA requests would be submitted to the FBI and the FBI's releases would then be analyzed. The group has, in fact, begun to submit its FOIA requests. DOJ 23.

6. In January 1978, an office of the FBI received information that a prime bombing suspect was making an FOIA request for his file. Sources close to the suspect advised the FBI that the suspect was seeking to discover what the FBI knew about his activities and the identities of the agents who were investigating him. FBI 22.

7. In 1976, a valuable and productive FBI informant stopped helping the Bureau. His reason for this decision was his concern over the FOIA, which he believed created the distinct possibility that his activities as an informant would be disclosed. This source had provided coverage on two major subversive or violent groups. FBI 27-8.

8. Member of a Marxist-Leninist organization decided in 1978-79 to use the FOIA to detect informants within their organization. The organization decided to direct FOIA requests to both the FBI and the CIA requesting information about itself. It was anticipated that a comparison of information concerning individuals, including dates, times and activities, would identify informants in the organization. FBI 27.

9. A group that advocated the violent overthrow of the United States made FOIA requests to the FBI. The Bureau withheld almost all of the information in the file, but in citing the exemptions used to withhold material, the FBI was required to state that they had used the exemptions for classified information and the informant exemption. The group was thus informed that there was an FBI informant in their midst; this knowledge ended the informant's effectiveness and brought to an end the FBI's access to reliable information. DOJ 16.

10. An informant who had previously furnished information on a timely basis relating to foreign terrorist activities had expressed reluctance to furnish additional information because of the possibility of his identity being exposed due to the FOI/PA. FBI 28-29.

11. An individual closely associated with a group that has claimed credit for bombings and murders recently filed an FOIA request with the FBI, demanding records relating to two particular events in 1980 and 1981 and further demanding not only records kept at FBI headquarters, but also records from several specified field offices. If the FBI withholds any information, it must state the specific exemption relied upon. The FBI believes that the requester could use the basis of the claimed exemption, the dates and locations of the requested records, and the particular events asked about to identify FBI sources.DOJ 13.

12. Joanne Chesimard, a member of a left-wing extremist group serving a prison sentence for murder of a state trooper was able to obtain more than 1,750 pages of FBI investigative reports about her activities. Many of these reports contained information provided to the Bureau by confidential informants, and some of the information was sufficiently specific to enable a knowledgeable person to determine the identities of sources. Shortly thereafter, the prisoner--with the aid of other members of the extremist group--escaped from prison. It is believed that information she learned from the documents produced to her under the FOIA has enabled Ms. Chesimard to evade FBI sources and techniques and remain at large to this day. DOJ 28-29.

13. A right-wing group in a southern state planned to bomb power installations in protest of the Panama Canal Treaty. A prominent local citizen learned of the plot and informed the FBI, which began an investigation of the plot's leader. After inter-

viewing a number of person, the FBI determined that there was insufficient evidence to bring charges and closed the investigation. The leader of the plot then filed an FOIA request for the FBI's investigatory file, and was able to have the bulk of the file produced to him. Although redacted, the documents in the file still contained enough information to enable the leader of the plot to identify the prominent local citizen as someone who had assisted the FBI. The leader of the plot then called the local citizen and confronted him about helping the FBI.

The next year, the leader of the plot was murdered. In the investigation that followed, the government once again spoke to a number of individuals who knew the murdered man. One of these persons gave the government additional details about the bomb plot, including evidence that the leader of the plot may have purchased a large quantity of explosives. At the close of the government's investigation, a local newspaper obtained the government's investigatory file on the murder and wrote a detailed article based upon the documents it had received under its FOIA request. Again, although the documents in the file were redacted, the information left in the documents enabled a knowledgeable person to identify the source of the information. Other members of the plot, upon reading the article, were able to identify the person who had provided the government with the information about the explosives. These individuals began to call the government's source anonymously, threatening the source's life. Knowing the violent nature of the members of the plot, the government's source moved to another state to escape the death threats. DOJ 19.

B. Organized Crime

14. The FBI lost a valued, top-level organized crime informant, who was the Bureau's most reliable source of information regarding a branch of an organized crime family. The FBI began its association with the source over a decade ago, and continued this association as the source increased his contacts with the organized crime family. The source was able to provide the FBI with the identities of subjects in several bank robbery cases and the confidant of a ranking member of the crime family, through which the FBI gained valuable intelligence on organized crime.

Several years ago, the Special Agent handling the source noted that the information being disclosed was becoming less detailed, current, and useful. Because of this, and because the Special Agent's control of the source was becoming diminished, the source's services were discontinued.

The source's services were lost because the organized crime figure targeted by the informant received a quantity of FBI documents under the FOIA. The crime figure displayed the documents to the informant, spread them out before him and said: "Let's see if we can find out how they got all this." Although the FBI had previously alerted the source that the organized crime figure had made an FOIA request, the source was never the same after seeing the identity of informants. The informant told the Special Agent that he had complete trust and faith in the Agent, but doubted the FBI's ability to protect information provided by its informants. The informant also pointed to the increasing popularity of the FOIA as an amusement whereby organized crime leaders obtained FBI records to taunt and intimidate members of their organizations from making any contact with law enforcement authorities. DOJ 5-6.

15. An informant connected with organized crime provided information in FBI cases, including some which led directly to the identification and prosecution of several federal violators. Inquiring into a dramatic decrease in his productivity, the FBI learned that he became very circumspect after an organized crime figure requested an received under the FOIA a large volume of FBI reports, apparently in an effort to identify informants. The informant expected organized crime to make much greater use of

the FOI/PA and doubted the FBI's ability to maintain control over the contents of its files. CG 6.

16. DEA Agents reported that a large scale investigation of a marijuana importation organization in a western city encountered FOIA-related difficulties at several junctures: throughout the investigation, witnesses expressed fear for their lives when approached by case agents; defendants were told by other members of the criminal organization that FOIA requests would enable them to identify anyone cooperating with the government; a car rental agency initially refused DEA's request for evidentiary information; and the defendant in the case, represented by attorneys who had made previous FOIA requests, appeared to have been well aware of DEA's investigative techniques. OLP 4.

17. A top organized crime figure, who was the focus of an extensive FBI undercover operation, filed an FOIA request with the FBI asking for documents relating to any electronic surveillance of him. Because the request was so narrowly framed, any FBI response other than a "no record" response would have revealed the existence of electronic surveillance. While the FOIA request was being processed, the FBI investigation was publicly revealed and the crime figure was indicted. But for the timely indictment, though, the organized crime figure would have been notified of the existence of electronic surveillance against him, possibly jeopardizing the undercover investigation. DOJ 12-13.

18. Three individuals were separately contacted by the FBI in an effort to obtain their cooperation in organized crime matters. Each of these individuals advised the contacting Agent they felt their identities could not be protected due to the FOIA. It is believed these individuals would have been cooperative had they not feared the FOIA and they would have been valuable FBI informants. Because of the wide publicity which the FOIA has received, these individuals were well aware of the public's ability to gain access to information in FBI files. FBI 18.

19. An informant who had been furnishing information to Special Agents of the FBI since 1953 regarding gambling, prostitution, stolen goods, and other criminal activities stopped furnishing any information to the FBI because he believed that the information could be disclosed under the FOI/PA. The informant felt his personal safety could be jeopardized if he were identified as an informant and he no longer wanted to take the personal risk entailed by providing information regarding criminal activities. FBI 24.

20. An organized crime figure obtained FBI documents under the FOIA. The documents included a reference to a short, unsolicited interview the FBI had held with the proprietor of a business establishment several years before. In a casual conversation with the businessman, the organized crime figure asked the businessman if he had been contacted by the FBI several years earlier. The businessman denied such a contact, and the crime figure laughed and walked off. The distraught businessman telephoned the FBI for an explanation shortly thereafter. DOJ 6-7.

21. An FBI office had success in developing a number of valuable informants from a group of loan shark victims. Later, in interviews, several of these individuals stated a desire to cooperate, but refused to do so for fear that the targets of the investigation would learn their identities through an FOI/PA release. FBI 20.

22. An informant told the FBI that members of an organized crime family in Detroit have been instructed to submit FOIA requests to the FBI in an effort to identify FBI sources. To date, 38 members and associates of the organized crime family have made FOIA requests. The list of requesters includes the

head of the family, the former head, and other prominent members of the group. Through this concerted effort, the members and associates of the family have obtained over 12,000 pages of FBI documents. The family is now free to pool these materials and analyze the FBI's documents to whatever level of sophistication and scrutiny their abundant resources permit. DOJ 8.

23. A DEA undercover investigation involving a reported organized crime figure was significantly compromised when an apparent FOIA release to another member of the same criminal organization revealed the existence of DEA's ongoing investigation. The criminal activity immediately declined; a decision regarding prosecution is currently pending. OLP 3.

24. In November 1981, representatives of a law enforcement agency of a foreign country refused to supply to United States law enforcement authorities a complete list the foreign government had compiled of 100,000 members of foreign crime families, including criminal records and investigative status. The activities of these foreign crime families have become a particular concern to United States law enforcement authorities because it is believed that these crime families have become active within the United States. The foreign official denied United States law enforcement authorities' request for the information on the grounds that, pursuant to the FOIA, a member of the organized crime families could determined that the information had been furnished to the United States by a foreign country, and could further determine whether or not there was a pending investigation against him. The foreign official noted that the FOIA had no provision enabling the United States government to make a "no records" response in answer to an FOIA request from a member of the organized crime families, and that any response other than a "no records" response would provide the FOIA requester with crucial information. DOJ 2-4.

25. During an FBI investigation of interstate transportation of obscene matter and interstate pimping of juvenile boys, school officials, fearing reprisals if their testimony were released through the FOI/PA, refused to verify the boys' identities. Citizens in the community only reluctantly cooperated and appeared to be holding back valuable information. Several expressed fear that their identities would be revealed through an FOI/PA release. Most of the citizens indicated that organized crime was involved and feared their reputations would be damaged or their physical safety threatened. Once source refused to provide any information because he did not believe the FBI could protect his identity and he feared for his life. CG 16.

26. An FBI field office informant related a conversation which occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI would be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected the provisions of the FOI/PA would be successfully utilized in identifying FBI informants. Agents who subsequently contacted this valuable source noted a subtle reluctance on his part to penetrate more fully the particular organized crime activities which he was in a position to cover. FBI 21.

27. An FBI office in a major city received information from several reliable informants that most organized crime members in the area have been instructed to write to FBI Headquarters requesting file information pertaining to themselves. These informants have advised the sole purpose of this process is to attempt to identify informants who have supplied information to the FBI on organized crime matters. Requests have been submitted by virtually every organized crime figure in the area. FBI 21-22.

28. In a DEA case, three defendants withdrew their guilty pleas after receiving information from DEA through the FOIA. The three were ultimately sentenced to the time they had served awaiting trial. OLP 3.

29. An FBI informant, who provided information regarding gambling and organized crime in a southern city, asked to terminate his FBI association because he believed that the FBI could not sufficiently protect his identity. The source was afraid that his identity might be revealed under the FOI/PA causing him to lose his business. CG 19.

30. An FBI informant was well-connected to organized crime elements, but his productivity dramatically decreased. Consequently, this decrease was discussed with the informant, who stated that he had begun to doubt the FBI's ability to protect the contents of its own files and information provided by its informants. He had learned that an organized crime figure had received over 300 pages of FBI documents and was unquestionably trying to identify informants. FBI 23.

31. Gary Bowdach, a convicted loan shark and admitted murderer, testified under oath before the Senate Permanent Subcommittee on Investigations about his use of the FOIA. Bowdach stated that, while in prison, he had often filed FOIA requests simply to harass the government, particularly the government prosecutor that had convicted him. In addition, Bowdach stated that he had aided other prisoners in obtaining their files from the FBI, the DEA and other government agencies. In one case, Bowdach and another prisoner were able to identify a person they believed to be a government informant because the suspected informant's name was not completely redacted. Bowdach testified that he believed that the suspected informant was murdered because of the FOIA release. DOJ 38-39.

32. The criminal informant coordinator of a northeast office of the FBI was told by an individual, who was potentially an excellent source of criminal information on the waterfront, that even though he had cooperated with law enforcement personnel in the past he would never do so again. He stated that he was afraid that one day, as the result of FOI/PA, he might "see his name in the newspaper." FBI 24.

33. An informant who was productive for many years in the area of organized crime and who furnished information resulting in numerous convictions became concerned that he might be identified. He indicated that newspaper accounts of FBI information disclosures under FOIA caused him to lose confidence in the FBI's ability to protect his identity. Because he had furnished information over a number of years, he believed it would be possible to identify him from a compilation of this information. The informant was presently in a position to furnish information on a major political corruption case, but refused to do so, stating that the more sensitive the information the more likely it was to "come out." CG 7.

34. An informant furnished information concerning organized crime figures and organized crime conditions. Subsequently, the source came to believe that no guarantee could be given that his identity would be protected. Accordingly, the source declined to furnish any further information to the FBI. FBI 23.

35. FBI agents working on organized crime cases in a southwestern city reported that they were excluded from intelligence meetings held by state and local law enforcement agencies. Several state law enforcement officers said that their concern over federal FOI/PA disclosures was the reason for excluding the agents from the meetings. CG 12.

C. Foreign Counterintelligence

36. A United States citizen declined to cooperate with the FBI in a unique opportunity to penetrate a hostile foreign intelligence establishment located in this country. Although otherwise willing to be cooperative, the citizen advised that he feared a future release of documents under the FOIA could reveal the extent of his cooperation and damage his financial livelihood. DOJ 24.

37. An individual who had requested his identity be protected and who had provided information about a suspected foreign government intelligence officer expressed concern that he could be identified as an informant for the FBI. The individual asked the Special Agent involved in the investigation whether his identity could be protected by the government, adding that he was concerned because he wished to have future business dealings with certain foreign countries. He felt that, should his identity become known to foreign government officials, it would cause damage to his business relationships. Because of the above, this individual stated that he did not wish to be contacted on a regular basis by the FBI. FBI 26-27.

38. An FBI Agent conducting a foreign counterintelligence investigation concerning possible loss of technology to a hostile foreign country, contacted an American businessman about a research program being conducted by his company. The individual was cooperative, but refused to release a copy of a company business report to the Agent, fearing that business competitors could obtain the report through the FOIA and learn of the company's research activities. DOJ 25.

39. One informant, a well-known and highly respected individual, had many dealings with certain foreign countries. The informant repeatedly voiced concern over possible disclosure of his identity through the FOIA. The source later requested that his contacts with the FBI be minimized in frequency and duration, that all information furnished be paraphrased, that his real or code names never be used, and that access to his information be severely restricted within the FBI. It became apparent also that, while the informant's dealings with certain foreigners are known to have increased, the frequency of his FBI contacts, the length of these contacts, and the amount of substantive information furnished declined. FBI 26.

40. An informant who furnished information regarding certain foreign visitors to the United States, expressed great concern over the possibility of his identity being disclosed. The source stated that he recently read in a local newspaper that foreign visitors could gain access to FBI records through the FOIA. FBI 28.

41. A businessman was approached by an intelligence officer from a hostile country. During an FBI interview, the businessman said that were it not for the FOI/PA he would be willing to cooperate with FBI in foreign counterirtelligence involving the intelligence officer who contacted him, plus any others. He refused to get involved, however, because he feared that his identity would be divulged, thus seriously affecting his business operations. CG 18.

42. A source providing foreign counterintelligence information expressed anxiety on numerous occasions about continuing his relationship with the FBI. He feared that his identity would be disclosed through an FOI/PA release, thus hurting his business and jeopardizing members of his family who reside inside the hostile country. Because of his fears, the source frequently requested the FBI to place dissemination restrictions on the information he furnished. CG 18.

43. In a southwestern city, an individual who was in a position to furnish foreign counterintelligence information refused to cooperate with the FBI. It was his opinion that the federal government could not insure his confidentiality in view of congressional scrutiny of the FBI, subsequent news media leaks leaks, access to records through the FOI/PA and the extensive civil discovery proceedings exemplified by the Socialist Workers Party lawsuit, where the court ordered the government to disclose the identity of some informants. The individual said that if the disclosure climate were more restrictive he would be willing to cooperate. CG 18.

44. In a western FBI office, an individual was contacted in a recent foreign counterintelligence investigation because he was in a position to furnish valuable information on a continuing basis regarding the subject of the investigation. Although this potential source displayed an otherwise cooperative attitude, he stated he would not furnish information for fear his identity might be revealed at some future date due to provisions of the FOIA. FBI 27.

45. A potential counterintelligence source advised that he could not cooperate with the FBI because he feared that his identity would be revealed publicly. He indicated that recent newspaper accounts regarding material released under the FOIA had revealed the names of several individuals in a professional capacity who had assisted the FBI, and the nature of their assistance. This type of publicity, according to the individual, would have been detrimental to any person in business who elected to cooperate with the FBI. CG 17-18.

46. A known intelligence officer of a foreign country told an FBI informant that, through intermediaries, certain officials of that country were using the FOIA/PA law to obtain information from the files of the FBI and other agencies. The foreign intelligence officer expressed some humor over the fact that such information is available. FBI 25.

47. In a highly sensitive, undercover national security investigation, the FBI approached an individual who was in a unique position to act as an informant in foreign counterintelligence activities. While willing to assist the government for patriotic reasons, the individual felt his identity might be revealed under the FOI/PA. He therefore felt compelled to report the investigation to his employer, thereby jeopardizing the investigation. FBI 25-26.

D. White Collar Crime/Official Corruption

48. On October 6, 1981, a midwestern office informed FBI Headquarters that a high-ranking law enforcement official was making an FOIA request in an attempt to identify members of his department who had cooperated with the FBI in the investigation of public corruption matters in that county. Subordinates of the official had been indicted as a result of the investigation, and the official himself was under investigation, although not indicted. Before making his FOIA request, the official had suspended a subordinate who had been a government witness in the case; the FBI case Agent believes that the FOIA request is an attempt to identify other subordinates for the purpose of further reprisals. The official's FOIA request was detailed, and asked for information about a number of subordinates and provided personal identifying information about them, such as their dates of birth. Several of the subordinates had, in fact, cooperated with the FBI in the investigation. In late 1981, approximately 100 pages of documents were released from the files of FBI Headquarters. The FBI believes that an additional 150 pages of field office files will also be released pursuant to this request. DOJ 19.

49. In a southwestern state, a highly placed political figure offered to furnish information to the FBI concerning a multimillion dollar act of political corruption. The information was never received because the FBI could not guarantee the political figure that his identity would not later be indirectly disclosed in response to sophisticated requests sent to the FBI. The political figure feared that the suspect could collect pieces of information from the FBI through the FOIA, then assemble the information, possibly using a computer, and identify the sources. FBI 12.

50. In an Interstate Transportation In Aid of Racketeering investigation, an individual was successfully enlisted as a

potential informant concerning racketeering and political corruption. However, upon learning of the provisions of the FOI/PA, this individual requested that his conversations not be recorded and refused further cooperation. FBI 21.

51. FBI agents investigating allegations of political corruption and gambling in a major metropolitan area, involving ranking city employees, found that a central figure in the investigation filed an FOI/PA request for any FBI records concerning himself. The figure boasted to a fellow employee that through this request and the FBI's response he could determine whether the FBI was investigating the matter and the extent of FBI penetration of the gambling ring. The figure further claimed that he could identify FBI informants through FOIA requests.

The FBI withheld from the figure the records relating to the investigation. However, since the Bureau was required to invoke the investigation exemption in order to withhold the documents, the figure was informed that there was an investigation proceeding against him. Shortly thereafter, subtle changes were made in the operation, including the shift of personnel from the corrupt department to other duties. The "purge" removed from the corrupt unit the employees that had cooperated with the FBI, and completely disrupted the FBI's investigation. DOJ 17-18.

52. An FBI Special Agent found that an individual in a high management position in a state agency wished to provide information to the FBI on a confidential basis. During one of the Agent's initial conversations with this individual, the individual specifically requested his name never be mentioned in FBI files due to "past legislation, FOI/PA, etc." The potential informant was in a position to furnish information concerning white-collar crime and political corruption; however, he subsequently refused to cooperate with the FBI, in spite of the Agent's assurance. FBI 20.

E. Bank Robbery

53. During the course of another bank robbery investigation, the FBI obtained a warrant for a female suspect. The investigation determined the suspect had applied for a job through a state unemployment office. That office refused to provide any information, advising it was protected by state and federal privacy acts. The FBI was required to obtain a subpoena to compel the unemployment office to disclose the requested information. During the period of time between the service of the subpoena and its return, the subject committed another bank robbery. If the state unemployment office had disclosed the information earlier, the second bank robbery would not have occurred, because the suspect would already have been arrested. FBI 17.

F. Dangerous Drugs and Narcotics

54. In a DEA case, the defendants and suspects included an experienced ex-police officer, a defense attorney specializing in criminal law, and an experienced drug dealer, all of whom were armed and considered violent. The ex-police officer had regularly submitted FOIA requests for a long period. As the investigation continued, the defense attorney and the drug dealer also began to submit FOIA requests. Several informants in the case learned that the subjects were submitting frequent FOIA requests. Two informants became frightened, ceased providing the DEA with information, and fled from the state. All of the defendants escaped conviction, although they were convicted of other charges in a separate case. DOJ 36-7.

55. For approximately three years, a telephone caller known to an FBI Agent only by a code name furnished information in a wide variety of cases, from drug-related matters to terrorism.

The caller never identified himself and advised he could never testify since to do so would risk death. The caller finally terminated his relationship, expressing fear that an inadvertent release of information by the FBI, under the FOIA, might identify him. FBI 18.

56. The head of a large organization that was involved in the trafficking of multi-ton quantities of marijuana in a southern state was indicted and arrested for income tax evasion. During plea-bargaining negotiations with another member of the organization, the defendant/witness indicated that he had made a Freedom of Information request to DEA in 1980, and was able to deduce the identity of the confidential informant. Although the name of the informant was redacted from the documents, Justice Department policy precluded DEA from withholding information relating to the undercover purchase of evidence involving a defendant/requestor, a Special Agent, and the informant when all three participants were known to one another. The defendant/witness presented copies of excised DEA-6's to the case agent, indicating that assurances of confidentiality were obviously insufficient. OLP 3.

57. The Bangkok District Office of the DEA reported that a well-placed individual who had cooperated with the DEA in the past refused to continue assisting the DEA in an investigation because he feared that his identity would be revealed through the FOIA. The informant, not an American citizen, is no longer working for DEA; though the investigation continued, its chances for success were greatly reduced. DEA 38.

58. In a drug investigation in a southern state, an informant from the state police was in possession of information that could have led to the indictment of 8 persons under investigation. However, the informant refused to testify or give DEA a written statement, specifically citing the FOIA and his fear of disclosure. Without cooperation from the informant, the methamphetamine lab was not located and the primary violators escaped prosecution. OLP 3.

59. A businessman believed by DEA to be a principal suspect in a major investigation involving the use of an aircraft leasing company learned of DEA's investigation through an FOIA request he had made to the U.S. Customs Service. The case was soon thereafter aborted. OLP 3.

60. A district office of the DEA reported that a confidential informant equipped with a recording device had several meetings with an alleged drug trafficker. In order to check the trustworthiness of the informant, the suspect filed an FOIA request and determined that both an investigation was being conducted and that the individual was, in fact, a DEA informant. The district office had no choice but to discontinue the investigation in order to protect the life of the informant, and to destroy any documentary evidence that had been thus far collected. DEA 38.

61. Several DEA District Offices in a southwestern state experienced problems with keeping informants because of the FOIA. A district office of the DEA reported that a DEA informant, working on an investigation, terminated his cooperation because of his fear of public disclosure. Another district office contacted two informants who had previously cooperated with DEA and requested their cooperation in a current matter. Both individuals refused to cooperate because of their fear of being exposed through the FOIA. Finally, a third district office reported numerous instances of refusal to cooperate by potential informants who all cite the possibility of disclosure of their identities as a basis of their refusal. DEA 37.

62. A resident office of the DEA was notified by a DEA informant that he possessed information regarding persons involved in the illegal distribution of cocaine. After initially cooperating, he notified DEA officials that because of the fact

that information being supplied might be subject to release under the FOIA he feared that his identity could become known and that his life would be placed in jeopardy if he continued his cooperation. The informant now refuses to fully cooperate with the office. DEA 38.

63. In the northwest, a major trafficker in multi-ton quantities of marijuana made an FOIA request to DEA following his conviction in federal court. The records, which contained FOIA-stamped reports that documented the defendant's cooperation with DEA, were distributed by the defense attorney to the defendant's criminal associates. The defendant is still anticipating possible repercussions from this action. OLP 8.

64. A district office of the DEA reported that a potential informant against a Class I source of supply is currently refusing to assist the DEA. Subsequent to his arrest, the potential informant received information pertaining to his own case through a Freedom of Information Act request and, as a result, was able to identify the informant who was responsible for his arrest. Since he was afraid that if he cooperates with DEA, anyone arrested as a result of his cooperation will similarly be able to identify him. DEA 37.

65. A DEA informant working with a western district office of the DEA in a South American investigation has expressed concern that his identity may be divulged through an FOIA inquiry. According to the informant, the many individuals and the numerous separate seizures and separate arrests involved in this investigation have led him to believe that any one of the defendants, submitting an FOIA request, could receive information which would compromise his identity. DEA 37.

66. In two recent California cases, individuals expressed a reluctance to cooperate with DEA because of the possibility that their statements would be released through the FOIA. One of these individuals, arrested for trafficking in cocaine, possessed vital information concerning his criminal associates. The information was lost to DEA. OLP 4.

G. Fugitives

67. In an investigation regarding an escaped Federal prisoner, a man telephoned an FBI office and advised he knew the location of the fugitive. The caller stated he was concerned that the fugitive would find and kill him if he furnished the FBI the information. The caller was given assurances that his identity and any information he gave would be considered confidential. The caller refused to give his name, specifically stating, "I know about the FOIA. Anything I tell you guys will get back to him." When asked the location of the fugitive, the caller stated he was in a motel on a certain street and then hung up to phone. After contacting numerous motels on that street, the fugitive was located and apprehended. FBI 16-17.

68. A kidnapping case involved a 65-year old victim who had been brutally beaten, stabbed and left for dead in a rural area of one state. The victim could only provide nicknames for the kidnappers. Investigation revealed that the subjects had attempted to gain transportation from the Traveler's Aid Society. The Society, after being advised of the urgency of the matter, nevertheless refused to supply information on December 20, 1977, from records which would identify one of the subjects and possibly reveal the whereabouts of both subjects. This information was subsequently obtained the next day by subpoena duces tecum and teletyped to an FBI office within a few hours after receipt. Both subjects were arrested in another state on December 26,

1977. However a few hours prior to the arrest, one subject shot and killed an individual in that other state. FBI 15.

69. During an unlawful flight to avoid prosecution/murder investigation, the FBI found out the nonpublished telephone number where the fugitive would be for the Christmas holiday. The FBI tried to obtain the location of the number from various officials of a midwestern telephone company, but they refused to release the information without a subpoena. As a result, the fugitive was not apprehended. CG 9.

70. In a fugitive-deserter investigation the FBI found out that the subject had worked at a particular oil company. The oil company was contacted but refused to provide the subject's address or other background information. The company feared future liability if the subject learned that the company provided the information to the FBI. Company officials believed the FBI would have to provide this information to the subject because of the FOI/PA. CG 20.

71. During the course of an investigation to locate and apprehend a fugitive, a Special Agent and a cooperating witness attempted to obtain information from a Western Union office, concerning a telegraph money order and message sent to the cooperating witness from the subject. Employees at the Western Union Company advised they could not disclose any information regarding the money order or message, due to "privacy concerns," without a court order. FBI 16.

72. During an FBI fugitive investigation of a subject wanted for extortion and firearms violations, an agent contacted a hotel's security officer to develop background information on a former employee who was as associate of the fugitive. This former employee allegedly had knowledge of the fugitive's whereabouts, but the security officer refused to provide any information from the files without a subpoena. The security officer believed that without a subpoena the hotel would be subject to civil litigation under provisions of the PA. CG 20-21.

73. During an investigation to locate an armed robbery fugitive, the local police developed an informant close to the fugitive. The informant initially provided valuable information, but upon realizing that the local police were sharing the information with the FBI the informant refused to continue cooperating, believing that her identity might be revealed through an information request under the FOI/PA. The fugitive committed several crimes during the additional time that was required to apprehend him. CG 19.

74. In June 1978, an FBI Agent from a southwestern city met with an informant to seek help inn locating a wanted person. The informant said that he did not want to continue providing information and would not help. The source believed that the FBI could no longer guarantee confidentiality in light of the FOI/PA and recent court cases such as the Socialist Workers Party lawsuit. CG 19.

H. Theft of Government Property/Fraud

75. One FBI office received information from an Assistant United States Attorney indicating that a woman had information concerning "ghost" employees and other frauds with the Comprehensive Employment and Training Act program. When contacted, the woman refused to be interviewed because she feared that her identity might be disclosed through an FOI/PA request. FBI 17.

76. An FBI informant who had regularly furnished information resulting in recovery of large amounts of stolen government property and in arrests and convictions for theft of government property, relocated and discontinued his services. Upon his return to a position where he could furnish similar information, he refused to cooperate because he feared that through an FOI/PA release he would be identified and his life would be jeopardized. CG 18.

77. The FBI was investigating the financial status of a person convicted of fraud against the government. This individual had consented to a $300,000 judgment. A potential government witness refused to furnish information regarding ownership and management of the defendant's assets. The potential witness believed that an FOIA release would adversely affect his business relations with the defendant. CG 17.

78. A long-time confidential informant stated, "I can't help you any more due to the Freedom of Information Act." This informant had previously furnished valuable information which led to arrests and recovery of government property. Even though the promise of confidentiality was explained to the informant, he still refused to furnish further information. FBI 22.

I. Background and Security Investigations

79. A Department of Justice applicant investigation developed a considerable amount of derogatory information. During one interview a federal district judge admitted that he had information which would bear on the investigation, but refused to furnish it to the FBI. The judge said he knew that his information, once released outside the FBI, would not be protected and would reveal him as the source of the information. CG 4.

80. A $600,000 civil suit was filed by a Honolulu plaintiff against a neighbor regarding derogatory information provided the FBI approximately 20 years before concerning the plaintiff in a suitability investigation. The FOI/PA request made by the plaintiff allegedly had enabled her to identify the defendant as the source of the derogatory information, which she claimed was defamatory. Although the lawsuit was ultimately dismissed because of the expiration of the statute of limitations, the suit required the defendant to retain private counsel at great personal expense and caused the defendant personal trauma. FBI 31-32.

81. During a background investigation of a nominee to a federal district court, the FBI contacted two attorneys. Both were extremely reluctant to furnish their opinions of the nominee's qualifications, fearing that if the nominee were appointed and later learned of their comments, he would use his position to punish them. The attorneys had little confidence in the confidentiality protection afforded by the FOI/PA, but eventually provided some comments. However, the FBI indicated that there was no assurance that they were as candid as they might have been before passage of the FOI/PA. CG 15.

82. During a background investigation of a nominee to a federal district court, the FBI contacted two attorneys. Both were extremely reluctant to furnish their opinions of the nominee's qualifications, fearing that if the nominee were appointed and later learned of their comments, he would use his position to punish them. The attorneys had little confidence in the confidentiality protection afforded by the FOI/PA, but eventually provided some comments. However, the FBI indicated that there was no assurance that they were as candid as they might have been before passage of the FOI/PA. CG 15.

83. In a recent background investigation conducted pertaining to a federal judgeship, one attorney contacted advised he had derogatory information concerning the judicial candidate. However, he declined to furnish this information to the FBI stating he felt the information would eventually be disclosed to the applicant under the PA. He felt that, if this disclosure ever occurred, he would be unable to practice before the applicant's court. FBI 11.

84. A prominent attorney was contacted concerning an applicant. He indicated he was in a position to furnish uncomplimentary information concerning the applicant, but advised the interviewing agent that due to the FOI/PA he would not do so. Thereupon, he furnished a brief, neutral commentary. FBI 10.

85. A federal district judge was interviewed in a background investigation concerning an applicant for a federal government job. The judge stated he did not feel that the FBI could provide confidentiality concerning his statements. He declined to furnish candid comments concerning the applicant and stated he did not wish to be interviewed concerning any FBI applicant investigation in the future. FBI 10.

86. During an investigation in March 1978 by a midwestern FBI office, private attorneys were interviewed concerning the qualifications of a candidate for a government position. The private attorneys initially declined to furnish derogatory information in their possession concerning the candidate, in view of the provisions of the PA. They did furnish pertinent information on a promise of confidentiality, but it is unknown what information they withheld due to fear of the effect of the PA. FBI 10.

87. During a 1978 Special Inquiry investigation in one city, the interviewee advised he was a business competitor acquainted with the appointee. He asked what degree of confidentiality could be provided if he furnished information regarding the appointee, and the FBI explained the relevant provisions of the PA. The interviewer said this was not a sufficient degree of confidentiality and added that he would have nothing to say about the appointee. FBI 31.

88. During the same investigation, a police officer advised he had derogatory background information concerning the appointee. He said he did not want to "go on record" with the FBI concerning this information in view of the PA. He stated that he considered the information so pertinent that it required his direct contact with the congressional committee which had requested the investigation. After receiving the officer's information, the committee requested the FBI to discontinue the suitability investigation. FBI 31.

89. In an applicant case, a person contacted by the FBI expressed concern that he could be identified by the applicant as someone who provided derogatory information because of the availability of this information to the applicant under the PA. Other persons interviewed simply refused to be candid regarding the applicant, due to their awareness that the information might be released to him. FBI 30.

90. FBI agents contacted the former employer of a person applying for an FBI position. Company officials provided the dates of employment, but refused to provide a recommendation or comment on the employee's performance, citing the PA and the fact that the information could become known to the applicant. The officials further stated that no other information would be provided regarding the applicant even if the applicant signed a release form. CG 17.

91. In response to an FBI inquiry concerning an applicant, a former Assistant United States Attorney confided that significant information, meaningful and derogatory, would not be forthcoming concerning the applicant because of the FOI/PA. When pressed by the FBI Agents upon this point, the former AUSA stated that he would counsel his clients not to furnish the FBI with derogatory information in applicant-suitability matters. FBI 10.

92. A former high official of one city was being considered for a White House staff position. An individual in that municipality refused to comment on the candidate's suitability since he believe the candidate would be able to obtain this information through the PA. The individual who was aware of the Act's provisions, stated he believed someone in the White House would have access to any comments he made. FBI 31.

93. An unsuccessful applicant for a bankruptcy judgeship obtained his file under the FOI/PA. He subsequently decided that several former employers and law partners had furnished derogatory information to the FBI about him. He filed a civil suit against these former employers and law partners and also filed an FOI/PA civil suit against the FBI. FBI 32.

94. In an FBI applicant investigation a local police official refused to provide derogatory information concerning the applicant. The official said that under the FOIA the applicant would have access to the information and, even if his identity were to remain confidential, the information could serve to identify him. CG 17.

95. A subject found guilty in a criminal case subsequently filed a civil action against witnesses who testified against him in that matter. He made several FOI/PA requests to discover the identities of additional witnesses whom he may join in his civil suit. FBI 32.

96. In an applicant investigation, an official of a police department refused to be candid in his remarks pertaining to the applicant in view of the FOI/PA. FBI 30.

97. In May 1977, a nationally known federal district court judge refused to be interviewed on an applicant matter because he wanted any information furnished about the applicant to remain confidential. It was the judge's opinion the FBI could not prevent disclosure of this information at a later date to the applicant under the PA. FBI 9-10.

98. In a southern state, the state chairman on one of the state's two major political parties was interviewed regarding a presidential appointment. The individual was advised of the provisions of the PA at the outset of the interview and requested confidentiality. He made one or two statements of a derogatory nature and then requested that these statements be disregarded. He stated that, although he was aware his identity could be protected under the PA, he was not confident this protection would be effective. After saying this, the interviewee would provide only a general statement regarding the appointee's honesty and terminated the interview. FBI 11.

J. Reduced Cooperation from Other Federal Agencies

1. Internal Revenue Service

99. During an FBI investigation in a western city, under the Racketeer Influenced and Corrupt Organizations statute, information developed on a subject was provided to an IRA agent. The IRS agent advised that due to the PA the IRS could accept information valuable to them but could not provide any information that would aid an FBI-related case. CG 11.

100. Also in New York, in three separate cases, information was requested from the IRS. These requests were denied on the basis of the Privacy Act. Since that time, IRS has stated it will honor only those requests for information which come from the Administrator of DEA. This has greatly increased the length of time which is required to obtain such information. DEA 40.

2. Social Security Administration

101. In a recent U.S. Secret Service stolen check investigation, three empty Government check envelopes were found in the suspect's bedroom. Each envelope had apparently been used by the suspect to practice writing the payee's name. Two of the written names were identified and the payees were located. The third name could not be identified and an inquiry was made at the local Social Security office to determine if checks were being issued in this name. Social Security office personnel cited the PA and refused to provide any information. Copies of the forged check were subsequently obtained through formal channels 6 months later. CG 22.

102. During an unlawful flight to avoid prosecution/murder investigation, the FBI found out that the subject was receiving a monthly disability check from the Social Security Administration. Although the Social Security Administration confirmed the subject was getting a check, it declined to furnish the address where the check was being sent because of the PA. The subject was eventually located, but it took over 3 months of investigative effort. CG 11.

103. FBI agents in the Pacific Northwest developed information that an escaped prisoner might have been receiving Supplemental Security Income payments. Local Social Security officials refused to supply any information about the fugitive, citing the PA. The FBI later apprehended the fugitive, after expending considerable manpower. The FBI found that the fugitive, at the time of his arrest had indeed been receiving Supplemental Security Income payments. CG 11.

104. In an eastern city, the FBI received information from the state police concerning possible fraud. An individual was allegedly receiving full Social Security disability payments, while still working full time. The FBI contacted the local Social Security office, but the office chief refused to provide any information, including whether or not the individual was receiving disability payments. The official cited the provisions of the FOI/PA as the reason for not giving the information. CG 22.

105. A father took his 5-year old son away from the boy's grandfather, who had legal custody. As a result, a federal warrant was filed for the father's arrest and the FBI began looking for him. Three months later, the father contacted the Social Security office in the city where the child previously lived and requested that the child's Social Security check be forwarded to another office. The Social Security office told the grandfather about the request. The FBI immediately contacted the Social Security claim representative, explained that there was a federal warrant for the father's arrest and asked where the father wanted the check sent. The claim representative told the FBI that Social Security headquarters had instructed him not to release any information without a subpoena. Two days later, the Assistant U.S. Attorney obtained a subpoena which the FBI served upon the claim representative. Local Social Security officials contacted the Assistant Regional Attorney of the Department of Health, Education, and Welfare, who advised them not to honor the subpoena based on Social Security regulations. The Assistant U.S. Attorney then advised the grandfather to go to the local Social Security office and request the needed information under the FOIA. Through an FOIA request, the grandfather received all the information needed to enable the FBI to locate the child and arrest the father. CG 21-22.

3. Other Agencies

106. The Department of Treasury report on the attempted assassination of President Reagan on March 30, 1981 cited a precipitous decline in protective intelligence as one factor that has made the Secret Service's task much more difficult. In the past, the FBI was the Secret Service's most important source of intelligence; since 1975 the volume and quality of intelligence provided by the FBI had deteriorated dramatically. One reason was the reluctance of informants and potential informants to provide confidential information to the FBI. Restrictions on the FBI's domestic intelligence gathering activities were also a major contributing factor. Department of Treasury, Management Review, II, 26-34 (August 1981).

107. A district office of the DEA in the midwest reported that an inquiry made to ATF for registration information concerning an automatic weapon was refused because of ATF regulations concerning the FOI/PA. ATF required that one of their agents be subpoenaed an present the information to a federal grand jury. DEA 40.

K. Reduced Cooperation from Foreign Governments

108. In the past few years, several FBI Agents have had contact with foreign police representatives visiting the United States. These representatives have come from Western countries, some of which have experienced internal problems with terrorism. These police representatives generally offered the observation that, despite their high regard for the reputation and professionalism of the FBI, they believed (one said it was sadly amusing) all of the fine efforts of the FBI are sometimes diluted, if not negated, when the investigative results have to be furnished under the FOI/PA to subjects of investigations. This same dismay over restrictions on the FBI was relayed by a person who traveled to another foreign country and visited that country's national police force. FBI 5.

109. The Royal Canadian Mounted Police (RCMP) continues to be very cautious when information is requested that may impact on their informants or is of a particularly sensitive nature, despite assurances by DEA that the information furnished by foreign police agencies will not be disclosed by DEA through the FOIA. It is the opinion of DEA officials that the FOIA has seriously damaged cooperative efforts that previously existed between DEA and the RCMP. DEA has been able to overcome many of these problems only by making explicit assurances that information will not be entered formally into DEA files and will not become the basis for court orders involving Title III's, Search Warrants, etc. OLP 5.

110. A citizen who has close contact with a foreign police agency discontinued his association with the FBI because he feared that, under the FOIA, information might be released which would identify either himself or this foreign police agency. FBI 5.

111. On April 11, 1978, an individual who had some contact with foreign police department officers declined to actively assist the FBI because of the fear of seeing his name in the newspapers. He advised the promise of confidentiality by law enforcement offices in today's political environment is worthless. FBI 4.

112. In recent conversations with two members of a foreign police agency in an investigation concerning copyright matters,

113. The DEA Philadelphia District Office reported that in one instance, as a DEA Agent spoke with an officer of the Royal Canadian Mounted Police, it became apparent that the officer refused to divulge information he received from an informant for fear that the informant's identity would not be protected by DEA against an FOIA inquiry. DE 40.

L. Refusals of Informants to Continue Assisting Law Enforcement Agencies

114. An FBI informant belonged in the early 1970's to an organization allegedly engaged in criminal conduct. In the late 1970's, the group's leadership began to suspect that there was one more informants in their midst. As they began to compare the FBI's releases, the group's leadership was able to pinpoint the identity of one of the two government informants; the other government informant was told that he was suspected of being an FBI informant. The leadership then instructed all members of the

group to make FOIA requests to the FBI for the purpose of obtaining additional documents to compare in order to find the identities of any other government informants. The government's second informant began to fear for his physical safety and livelihood, and the FBI's confidential relationship with him was terminated. DOJ 11.

115. Since the advent of the FOI/PA, numerous documents containing information furnished by an FBI informant of longstanding have been released under provisions of these laws. These releases have had a deleterious effect upon the informant's relationship with the FBI. There has been a noticeable decrease in the volume of information furnished by the informant, who has been frank to state that he no longer has his former confidence that the FBI can maintain the confidentiality of his relationship. On numerous occasions, the informant has expressed reluctance to furnish information which he fears might be released under the FOIA, resulting in his physical jeopardy or leaving him open to civil suit. This informant did not terminate his relationship with the FBI, but the relationship became a very tenuous one. FBI 28.

116. In September 1977, a former Special Agent advised the FBI Agent that an informant had contacted him upon learning that an FBI suspect had obtained documents under the FOI/PA. The informant expressed fear the suspect would be able to identify him as a confidential source, since the suspect's purpose in making the FOI/PA request was to identify individuals who had provided information to the FBI about him. FBI 27.

117. A confidential source stated he was fearful his name would become known to certain individuals. He cited their possible access through FOI/PA requests to the information he had provided. The source became unproductive and contact with him was discontinued. FBI 24.

118. A long-time informant announced that he felt his confidentiality could no longer be guaranteed and refused to furnish further information. Provisions of the FOI/PA were explained to the informant, particularly relating to protection of informants and informants' information; however, this informant still wished to sever contacts with the FBI. FBI 24-25.

119. On several occasions, an informant voiced his concern for his safety out of fear that his identity would be revealed under the FOI/PA. He stated that when he began assisting the FBI it was his understanding that his identity and the information he furnished would always remain confidential. FBI 29.

120. An informant of one FBI office expressed concern that individuals about whom he had provided information were requesting their FBI files under the FOI/PA. This informant expressed fear for his personal safety and that of his family. This source had in the past provided reliable and corroborating information about individuals who have been convicted of federal crimes. Later, there was a reduction in amount and quality of the source's information. FBI 29.

121. In a Western FBI field office, a former highly productive confidential informant advised that he did not feel secure helping the FBI due to widespread publicity concerning FBI informants and the FOIA legislation. He stated that, although he continued to maintain his relationship with the FBI in confidence, he was not sure that the FBI could do the same. For this reason, the informant discontinued all contact with the FBI. FBI 23.

122. A criminal informant, who furnished very significant information in an automobile theft ring case, told the FBI that he feared for his life after reading in various newspapers of disclosures made under the FOI/PA. As a result, the informant will no longer furnish information which is singular in nature. FBI 20.

123. The FBI made several attempts to reactivate a former source, who had once been extremely cooperative and productive. Current attempts to persuade the source to again aid the FBI were unsuccessful; the former informant refused to cooperate because he believed his identity could not be kept secure due to FOI/PA disclosure policy. FBI 20.

124. An individual in a position to know information about an FBI subject stated to a Special Agent that she would not furnish any information lest it and her identity appear in the newspapers. She made reference to information which was being published in the press as a result of an FOI/PA request. FBI 19.

125. A potential informant advised he would not cooperate with the FBI due to fear his identity would be publicly revealed, which would be detrimental to his profession. This potential informant referred to news accounts in the local press regarding material made available under the FOIA, which had disclosed the names of several individuals in professional capacities who had assisted the FBI and the nature of their assistance. This type of publicity, according to the potential informant, would be detrimental to any individual in business who elected to cooperate with the FBI. FBI 19-20.

126. In August 1976, an FBI field office contacted a source to determine why he was not now providing the FBI with information as he had been in the past. This source replied that he was in fear of losing his job and of retaliation by individuals about whom he might furnish information. The source asked if the FBI could guarantee the confidentiality of his relationship and of the information he furnished. He stated he was particularly concerned about confidentiality in light of the FOIA. In view of his apprehensions, this individual is no longer being contacted by the FBI. FBI 19.

127. Two individuals in a position to furnish the FBI with important information regarding a series of train wrecks refused to do so because they feared the FOIA would force the FBI to reveal their identities. This attitude existed even after assurances were given by the agents regarding the FOIA. FBI 17-18.

128. Agents contacted a former criminal informant who associated with several individuals under investigation. The source, who displayed knowledge of the FOIA, expressed extreme concern of the disclosure provisions. The two agents spent approximately one-half hour discussing this with the source. Both agents were of the opinion that the FOIA prevented them from obtaining details of value. FBI 25.

129. A confidential source advised that "general street talk" was that one should not provide information to the government since this information would eventually be publicized as a result of the FOI/PA. FBI 24.

130. An informant who know a great deal about a violent group became reluctant to furnish information on the gang because of the FOI/PA. he considerably reduced the amount of information he furnished to the FBI. FBI 22.

131. In 1976, an active informant stated he would no longer continue in that capacity because it was his belief, as a result of the FOI/PA, his identity and confidentiality could no longer be protected.

M. Identification of FBI Informants

132. A Federal inmate convicted of unlawful interstate flight to avoid confinement and attempted murder of law enforcement officials confronted and threatened an FBI source in a prison exercise yard. The source had provided the Bureau with valuable information about a bank burglary conspiracy matter involving the inmate. The inmate showed the source an FBI document he received under the FOIA, and accused the source of being a government informant. The accusation was based on the inmate's reasoning that because only three people knew the details of the crime discussed in the document, and two of those names appeared in the document caption, the name of the missing person must also be the name of the informant. In order to protect the source's life, prison authorities were required to transfer the source to another facility. However, the source's usefulness was ended and word has reached the street the source is a government informant. DOJ 15.

133. After studying a Bureau FOIA release, a researcher with detailed knowledge of the subject matter claimed he was able to identify the individuals who had cooperated with the FBI, even though the individuals' names were deleted from the released documents. The researcher then wrote an article criticizing those who had cooperated with the FBI. DOJ 35.

134. In response to documents it received from the FBI pursuant to an FOIA request, a newspaper printed a story that identified by name an FBI informant. The story stated: "Though many of the names have been blacked out by FBI officials, other documents indicate that a Salt Lake City resident [individual named] was the FBI informant." DOJ 35.

135. An FBI source, extremely upset, told an FBI Agent that he had received a call from an individual who told him that an FBI FOIA release identified him as a government informant. Although the FBI had invoked the confidential source exemption during processing, the individual had nonetheless been able to identify the government's informant. DOJ 35.

N. Refusals of the General Public to Cooperate with Law Enforcement Agencies

136. In July 1981, a private citizen in the Washington, D.C. area approached the FBI and advised that he could furnish information involving fraud against the government by a high-ranking employee of an executive department. The citizen asked whether the information he provided could be kept in confidence by the FBI. The FOIA was explained to the citizen and methods by which his confidentiality could be maintained were discussed. The citizen told the FBI that, in view of the FOIA, he did not want to furnish information to the FBI. Even though the information was nominally exempt, the citizen expressed fears that the information would be given out by mistake if the subject of the investigation made an FOIA request.

137. The FBI initiated a Racketeer Influenced and Corrupt Organization investigation based on information provided by businessmen in a small southwestern town. The businessmen asked that they not be called to testify because they feared their businesses would suffer. Upon later learning that the information might be disclosed through an FOI/PA release, they decided not to furnish further information. Without this assistance the FBI had to discontinue the investigation. CG 15.

138. In a fraud investigation in a southwestern city, a former employee of the company being investigated, who had been a principal source of information, was fearful that he would be sued by the subjects of the investigation if he provided information to the FBI. He knew this information would be available

upon request under the FOI/PA, and if the criminal allegation were not ultimately resolved in court, he would become civilly liable. On several occasions this source expressed reluctance to provide information of value. CG 5.

139. During the course of a Racketeer Influenced Corrupt Organizations case involving certain union members and company officials, the investigating Agent contacted nonunion employees concerning alleged harassment by union members and the firing of several rifle shots at nonunion members. A prospective witness to a particular incident declined to furnish any information to the FBI, on FOI/PA ground, stating that, "the Government just can't keep a secret anymore." FBI 16.

140. In a similar FBI case, a labor union official refused to furnish information to the FBI. He claimed he would have no confidence in the security of his information in view of the ability of individuals to obtain their files under the FOI/PA. FBI 16.

141. Shortly after a skyjacking took place, an unidentified caller, who identified himself only as a medical doctor, told a Special Agent that the skyjacker was probably an individual who was an outpatient at the psychiatric clinic where the caller was employed. He stated the individual was schizophrenic and dangerous to himself and to other persons. The caller suggested that a psychiatrist should be available during all negotiations with the skyjacker. The caller's identity was requested since he was obviously knowledgeable concerning the skyjacker and could furnish possible valuable information in an attempt to have the skyjacker peacefully surrender. Despite the fact that several lives were in jeopardy, the caller stressed that he was unable to furnish his name because of FOI/PA requirements and terminated the call. Because of this telephone call, the FBI did have a psychiatrist available during negotiations with the skyjacker (who had been correctly identified by the caller) and the skyjacker's surrender was accomplished without loss of lives or property. FBI 18.

O. Reduced Cooperation from State and Local Law Enforcement Agencies

142. DEA's El Paso Intelligence Center (EPIC), a joint intelligence operation involving those federal agencies who have jurisdiction over the importation of illegal substances into the United States, has received word from a state police agency that reports henceforth being sent to EPIC shall not be duplicated nor further distributed without their direct consent. While DEA remains legally responsible for requests for this type of information, any release is bound to further strain the working relations between EPIC and the state police. DEA 41.

143. A DEA district office reported that another state police agency's criminal intelligence division, had refused to divulge any information to DEA. Citing the possibility of having to reveal the source of their information at some time in the future, the state police have unequivocally stated that they will not reveal their intelligence. DEA 40.

144. In a civil rights investigation in which the subject was a former employee of a state law enforcement agency, the head of that agency advised that the subject's personnel file contained several previous complaints concerning his alleged brutality. However, the agency refused to make the personnel file or information contained in it available to the FBI, out of fear the subject would have access to this information under the PA. FBI 2.

145. The state police of a mid-Atlantic state will not, in routine cases, provide DEA with information that was obtained by a confidential informant. Further information that is not of an enforcement nature, such as information needed for DEA's responsi-

bility to regulate the legitimate drug industry, is currently not being exchanged as was prior to the 1974 FOIA amendments. The state police reported that if the information sought in licensing investigations is not in the form of a final disposition it will not be released. If a release of information is made to DEA, the information will be limited strictly to data relating to specific convictions, arrests, and case dispositions. Intelligence information is generally withheld. OLP 4.

146. A DEA district office in a southeastern state reports that the state police, with whom DEA works jointly on many investigations and participates routinely in the exchange of intelligence reports, has become concerned because of a state statute which prevents disclosure of state police reports to anyone without their permission. Since these documents, once entered in DEA files, are subject to the provisions of the FOIA, the DEA office is concerned that the release of these documents will directly affect the working relationship between DEA and the state police. DEA 40.

147. The FBI learned that an FBI applicant was a former employee of a midwestern state's bureau of investigation. When contacted, the state bureau officials acknowledged they had derogatory information concerning the applicant but refused to reveal the information because the applicant would have access to it under the PA. CG 23.

148. A state police agency's criminal identification and investigation unit was contacted by the a Resident Office of DEA to determine if they would consider participating in EPIC. The chief of the identification unit stated that because the state did not have a freedom of information act, he was concerned that providing DEA with intelligence would possibly alert suspects of state investigations. He therefore announced that he would defer from participating with DEA in EPIC at this time. DEA 41.

149. During a suitability investigation of a political appointee, the officer in charge of a police department organized crime bureau advised the FBI that he had furnished derogatory information about the appointee directly to the congressional committee which had requested the FBI investigation. He added that the derogatory information concerned national security, but refused to comment further. The officer later told the FBI that he was thoroughly familiar with the confidentiality provisions of the FOI/PA, but was also aware that the legislation is subject to interpretation. Consequently, he refused to give the derogatory information to the FBI. After receiving this derogatory information, the committee refused to provide this information to the FBI and requested the FBI to discontinue its investigation. CG 23.

150. A midwestern state's police intelligence unit advised that the unit's officers will provide information only to federal agents who they know personally. Their rationale is that they can trust the agents they know to properly conceal informant identities even if the information is later released under the FOI/PA. CG 23.

2. Local

151. Since the spring of 1976, a southern office of the FBI has encountered an express reluctance by a police department and a sheriff's office's intelligence unit to cooperate in furnishing written information to the FBI on security, as well as criminal matters. A member of the intelligence unit stated that, despite past FBI assurances that all intelligence information would be considered confidential, it had been learned a former black

activist, who had made an FOIA request to the FBI, was furnished a copy of an intelligence report previously furnished to the FBI by the police department. Although this document did not reveal the identity of any informant, that local agency advised it had no choice but to decline to furnish further written information to the FBI, in order to prevent this situation from arising again. FBI 4.

152. A chief of police stated in the early part of 1977 that if any information is released by federal law enforcement agencies as a result of a request under the FOI/PA, which indicated that the source of information was his police department, he would no longer allow his department to furnish information to any federal law enforcement agencies. FBI 3.

153. A representative from the criminal conspiracy section of a certain police department stated that his section is very reluctant to discuss information concerning possible intelligence operations. The representative stated he feared this information could inadvertently be released by the FBI to an individual pursuant to an FOI/PA request. FBI 3.

154. During a meeting of a state's organized crime intelligence units this past summer, officers of a local sheriff's department and a local police department formally voiced a reluctance to share intelligence information with federal agencies because of the accessibility of the information through the FOIA. As part of their presentation, an example was cited in which local officials, who had served a search warrant on an individual affiliated with organized crime, discovered that the individual had obtained an FBI report containing sensitive intelligence information that had been supplied by the local police to the FBI. Since that date, no intelligence information has been received from either the local police department or the local sheriff's department by the DEA office reporting the incident. OLP 4-5.

155. A western DEA District Office also reported having difficulty developing a case involving a criminal organization engaged in the illicit diversion of drugs totaling more than 300 million dollars annually, and believed to be directly linked to organized crime in Las Vegas. The case is stalled, in large part, because the local police department has refused DEA access to an informant who allegedly possesses crucial information because of the potential for disclosure in a Freedom of Information request. OLP 5.

156. In civil rights matters, officers of a certain police department have been cautioned by their departmental attorneys that, when interviewed as subjects by FBI Agents, they should respectfully decline to furnish any information based on the 5th Amendment. They have been cautioned further that any statement they do make to the FBI would be subject to disclosure under the FOI/PA. FBI 3.

157. Two police departments in a certain state will not share their informants and, more importantly, a substantial amount of their informant information on federal violations, for fear an informant will be disclosed accidentally by the FBI through an request. FBI 3.

158. In a major city, a cooperative system of investigative records which was developed between the Regional Office of the Drug Enforcement Administration, a joint task force, and the city's police department to coordinate narcotics investigations that had been initiated among any of the three participants, was forced to be turned over to the exclusive jurisdiction of the city police department. Fearing that information contained in the system would ultimately become the subject of Freedom of Information Act requests, the police declared their intention to withdraw from the program. Since this withdrawal could have resulted in not only an adverse impact on the enforcement capability in the area, but in the possible harm to individual law enforcement officials acting in an undercover capacity, DE agreed

to turn over full authority and custodial responsibility of the records system to city police. While there has not been a noted loss of efficiency in the system, it is strongly felt by DEA officials that this type of system fundamentally belongs under federal control and that the transfer of the controls of this system to the city police somewhat diminishes DEA authority in this area. OLP 4.

159. The following letter was written by the Chief of Police of a major city:

> "With respect to FBI files being made accessible to persons or organizations pursuant to the Privacy Act or the Freedom of Information Act, I request that all investigative records of information, from whatever (deleted) Bureau of Police source (including the deleted) Police Bureau as an organization, its employees, etc.), in your files be protected and kept confidential.
>
> "If such protection cannot be assured to this organization by the FBI, we will only be able to cooperate in the exchange of nonsensitive, nonconfidential information. The (deleted) Bureau of Police would not be able to pass on sensitive information to the FBI without his assurance of confidentiality, and the effectiveness of the working relationship between our organizations would be greatly diminished." FBI 2-3.

160. A detective of a prosecutor's office was contracting his local sources to find the whereabouts of a former resident who was a Federal fugitive charged with murder. The detective said his sources and contacts in the Cuban community were reluctant to provide information in this case or others because of the fear of disclosure under the FOIA. FBI 12.

161. A Regional Office of the DEA in a major city reported that officers of the local police department who are assigned to work with DEA on investigations are not permitted to release any intelligence information to DEA that has been generated strictly by the police department or by its informants. In those instances where a formal request for information is made from DEA to the local police department, a response is made by forwarding summary data or excised portions of police reports to the requesting DEA official.

162. The same Regional Office of the DEA also reported that in those instances where DEA and the police department are investigating the same crime, it is virtually impossible to obtain information, especially if it was originated by a local agency informant. As a result, it is quite common to have two sets of investigations simultaneously proceeding on both the federal and local level, requiring the development of two distinct sets of evidence. The simultaneous investigation of defendants by DEA and the state and local authorities, aside from generating a significant waste in manpower and resources, also heightens the possibility that the ongoing investigation will be made known to those under investigation, since a significant increase in the amount of police work in the area is required. OLP 3.

163. A representative of a certain police department intelligence division has stated he is very reluctant to furnish information regarding possible domestic revolutionaries. He is fearful such information could inadvertently be released pursuant to the FOI/PA. FBI 12.

164. In a recent civil rights investigation, an effort was made to obtain a copy of a police department report of the victim's death. Local authorities would make the report available for review, but declined to provide a copy for inclusion in the FBI's investigative report. Anticipating a civil suit would be filed against the city and police department arising from the victim's death, they questioned the ability of the FBI in view of the FOIA and PA to maintain the local report in confidence. FBI 2.

165. In accordance with a request from the Department of Justice, U.S. Secret Service offices were required to make inquiries regarding the organized crime situation in their respective districts. In connection with this effort, an agent interviewed the Chief Investigator for a County District Attorney's Office, who had considerable background on organized crime activities. When interviewed, he declined to release any information. He stated that under the FOIA records and files of government agencies could be obtained by non-law enforcement personnel, that much of the information he had could not be positively substantiated, and that he could be liable for making statements he could not fully prove. He further advised that if his identity as a source of information were obtained under the FOIA, he might be subpoenaed before another body to testify on the information he had, possibly compromising his informants. CG 5.

166. Due to the FOI/PA, difficulty has been experienced on several occasions in obtaining information from a certain police department. Some officers have stated their reluctance to make information available concerning subjects of local investigation because of these Acts. The organized crime control bureau and the intelligence division of the police department have expressed concern over the FBI's ability to protect sources of information. FBI 1.

167. A southern city's police intelligence unit learned that one of its intelligence reports, furnished to the FBI with assurances of confidentiality, had been released under the FOIA. Although this document did not reveal the identity of any informants, the unit refused to furnish anyfurther written information to the FBI. It simply did not believe the FBI could guarantee confidentiality for information provided, and it wanted to avoid the possible compromise of informants. CG 12.

168. An extremist organization's leader, who was convicted of two murders, received documents from FBI headquarters through an FOIA request. The convicted leader's attorney informed a mideastern city's police intelligence officer that, after reviewing the documents, the leader had identified the police department's informant in the murder case. This police department will no longer furnish written reports to the FBI. CG 12.

169. In a southwestern state, a member of a local law enforcement agency told the FBI that while police reports and other verified data would be shared, the agency would be reluctant to provide intelligence data because of the possible release under the FOI/PA. CG 23-24.

170. In an eastern city, the FBI reported that local police officers are reluctant to make all information available concerning subjects of investigations because of the FOI/PA. The police department has told the FBI that if one of its sources is exposed through an FOI/PA release, it will no longer make its records available to the FBI, even on a personal basis. CG 24.

P. Refusals of Private Corporations and Public Institutions to Cooperate with Federal Law Enforcement Agencies

1. Banks

171. In a case involving approximately 100 forged checks in a midwestern city, the U.S. Secret Service attempted to develop information on the accounts in which these checks were deposited. Banks refused to furnish copies of documents from three accounts without a subpoena, even though the banks stood to lose a total of $40,000. These banks cited the PA as a reason for failing to furnish the requested information. Information was provided only after subpoenas were served. CG 9.

172. A west coast bank advised the FBI that the bank had made a $100,000 loan to an individual who appeared to have provided false information on the loan application. The bank indicated that this person may also have defrauded several other banks. The FBI contacted the bank official who had the loan records but he refused to release the documents without a subpoena. The FBI then contacted the Assistant U.S. Attorney who advised that he would not issue a subpoena without knowing what information of evidential value was contained in the records. Because of the "Catch-22" situation, the FBI closed the investigation. The case was eventually reopened in light of the amount of losses suffered (several million dollars). CG 20.

173. A former president of another bank obtained loans using fraudulent financial statements. The bank would not make available to the FBI the personnel file, the loan file, or the results of the internal audit regarding the president's activities, because of the PA. This information was not available from other sources. FBI 7.

174. A U.S. Secret Service Agent, working undercover, learned that a $3,800 U.S. Treasury check had been stolen, forged, and deposited in a bank account in a west coast city. The Secret Service immediately called all the banks in the city, with negative results. The undercover agent later learned which bank had received the check. When he visited this bank, bank officials acknowledged they had been contacted earlier, but had ignored the inquiry because it was bank policy not to reply to law enforcement inquiries because of the PA. By the time the agent made the initial telephone call to the bank, $500 had been withdrawn from the account. The subjects withdrew an additional $2,500 between the initial call and the visit by the Secret Service Agent. The bank would have prevented a $2,500 loss if it had cooperated when first contacted. CG 19-20.

175. During an investigation concerning the disappearance of $1,000 from a bank, investigating agents contacted a senior vice president to request background information on a particular suspect bank employee. The vice president advised that, due to recent federal and state privacy legislation, he could not furnish personnel information concerning this employee, as he feared the employee might then have grounds to file a lawsuit for invasion of privacy. FBI 7.

176. In an investigation involving false statements to an estimated 50 to 65 banks resulting in $3.8 million in lawsuits, an FBI office served a subpoena for bank records on a bank and made request to interview bank officers who had been personally contacted by subjects. The bank, a victim of the scheme, would not permit the requested interviews without additional subpoenas directed to the officers involved. By way of explanation, the bank advised the PA prevented discussion of any information concerning a bank customer without subpoena. FBI 7.

177. Citing the PA, a large bank would not make available details of a particular financial transaction without a subpoena, although the bank was the vehicle in a possible $2.2 million fraudulent transaction involving interstate transportation of stolen property. FBI 6.

178. A certain bank was the victim in a case involving bank fraud and embezzlement conspiracy. Losses suffered in this case were approximately $476,000. Bank officials advised that under bank policy, which was based on the FOI/PA, they would furnish no information to the FBI without a subpoena duces tecum. FBI 7.

2. Telephone and Telegraph Companies

179. A local security office of a telephone company referred an illegal telephone call case to an FBI resident agency. However, the company refused to furnish any data concerning the principals involved in the violation without a subpoena for telephone company records. FBI 14.

180. The resident office of the DEA in a southern state reported that Western Union in their area now refuses to divulge any information except by subpoena which cites the specific information in question. DEA 43.

181. A west coast telephone company informed the U.S. Secret Service that whenever the company releases information about a nonpublished number, they will immediately notify the subscriber that an inquiry was made and who made the inquiry. Consequently, agents must now decide whether to obtain the information and thus alert the subscriber, or not use this important investigative tool. CG 21.

182. DEA's South Central Regional Office reported that an investigation was delayed by nearly 6 months because Western Union employees were reluctant because of the uncertainties associated with both federal and state disclosure and privacy laws to notify DEA that a high level violator had been using Western Union to make financial arrangements for illicit shipments of controlled substances for a lengthy period of time.

183. A forged U.S. Treasury check was used to pay a telephone bill. The telephone company supervisor refused to furnish U.S. Secret Service Agents with any information about the individual who negotiated the check or the telephone account involved. Although the U.S. Secret Service Agent pointed out that the telephone company was a victim in this case, the company refused to furnish any data without a court order. The Secret Service Agent said that this information would not have been withheld prior to enactment of the FOI/PA. CG 19.

3. Insurance Companies

184. In the field of arson investigations, major insurance companies and the Fire Marshal Reporting Service have stated they will provide no information to federal law enforcement agencies except under subpoena. They advise their legal departments believe this position is necessary for protection against civil suit, in the event of an FOI/PA disclosure.

185. In a Racketeer Influenced and Corrupt Organizations investigation involving numerous subjects in an arson-for-profit scheme in which insurance companies are defrauded after the insured property is burned, at least 15 insurance companies, numerous insurance claims adjusting firms, and insurance agents have refused or have been most reluctant to furnish files regarding losses and coverage because of the universal fear that the information furnished could be obtained by the insured in an FOI/PA disclosure which the insured might use against the insurance company or firm in a civil suit. The FBI has been required to obtain federal grand jury subpoenas to secure the desired information, which in every instance caused delay in the investigation. Many of these firms cited widespread news publicity resulting from FOI/PA disclosures as cause for their total lack of confidence that the FBI would maintain information in confidence.

4. Hotel

186. A district office of DEA in a southern state reported that during the past two years the majority of motels and hotels in the coastal Georgia area have established a policy of refusing to allow law enforcement officers to even peruse their registration records informally without a subpoena. These businesses indicated that their attitude has been based on a fear of lawsuits emanating from the Freedom of Information Act. DEA 43.

187. A hotel which is a part of a large nationwide hotel chain refused to furnish information on guests, including foreign visitors, without a subpoena, due to the enactment of the FOI/PA. FBI 8.

188. Numerous hotels and gambling casinos in the State of Nevada, which would formerly furnish information from their records on hotel guests and gambling customers during routine investigations, now require a subpoena before they will release any information to the FBI. The reason given by hotel officials is for protection of the hotel in the event the subjects of an investigation bring a lawsuit following an FOI/PA release. FBI 8-9.

5. Department Stores

189. During the course of an investigation, agents sought to review employment records at a department store and were advised that employment records were no longer available because of the PA. Agents also attempted to secure information concerning the subject from two other stores and were advised that this information was not available without a court subpoena. FBI 13.

190. A district office of the DEA in California reported that several national companies like Sears and Penney's in the area have refused to give information regarding former employees who were seeking employment either with DEA or the San Diego County Narcotics Task Force. When asked for the reasons in their change of policy, the stores cited the FOIA. DEA 42.

6. Hospitals

191. An individual the FBI identified as operating a check-kite scheme with banks in several states had been hospitalized. Investigation determined this individual had initiated his check-kite scheme from a hospital telephone. Nevertheless, hospital officials, citing the FOI/PA, refused to verify his hospitalization or dates of confinement. FBI 8.

7. Airlines

192. In an FBI case an airline company accepted a stolen check for airline passage. When its computers indicated to the ticket agent that the check was stolen, the airline refused to issue the ticket which already had been completed by the ticket agent. During the course of FBI investigation, the airline was requested to surrender the completed but unused ticket as evidence; however, the airline company declined to make the ticket available to the FBI due to the FOI/PA. FBI 6.

8. Oil Companies

193. Because of the FOI/PA, the policy of a major oil company limited the type and amount of information that the company would provide to the FBI regarding an applicant for employment. The personnel clerk for that company advised that, even when an applicant has executed a waiver form, the only information the company will furnish regarding the applicant's employment is verification of employment, dates of employment, position and salary. FBI 13.

9. Public Schools and Universities

194. In an applicant investigation, a waiver was provided the FBI to obtain medical records concerning hospitalization at the health center of an educational institution. The school physician refused to provide any information either to the FBI or to the applicant, even after the latter personally went to the health center to sign a second waiver drawn by the school. The office of the school president told the FBI that the school's refusal to release information was due to the PA. FBI 7-8.

195. The FOIA is hampering the DEA's ability to use its domestic network to proceed with thorough investigations. A DEA resident office in western New York indicated that they received a request from a southern district office for background information from a local university concerning a former student. The admissions department of the university refused to furnish the information, citing the PA. DEA 43.

10. Others

196. An Equal Credit Opportunity Act case involved a limited investigation based on a Department of Justice memorandum which directed that 14 former employees of a loan company be identified and interviewed. Citing the PA, the loan company's legal counsel declined to identify to the FBI the 14 former employees. Instead, he had his current employees make personal contact with these 14 individuals to request their permission to release their names to the FBI. This indirect process delayed the investigation for a one-week period. The company was also asked to release loan applications of certain individuals who had been granted loans within the past 18 months. On the basis of the PA, the loan company declined to release these financial documents. FBI 14.

197. During a routine investigation, a Special Agent sought the cooperation of a company's personnel manager to determine a company employee's residence from company records. Citing the restrictions of the PA, the personnel manager would neither confirm the subject's employment with his company nor provide any background information. FBI 12.

198. In a case involving corruption of public officials consideration was being given for change of venue to another city. The local FBI office was requested to review newspaper clipping files to determine the amount of publicity the corruption matter had received. On April 10, 1978, a newspaper editor advised that, in light of the FOI/PA, no information from newspaper clipping files would be made available to the FBI except upon service of a subpoena. FBI 11.

199. The San Juan, Puerto Rico District Office of the DEA reported that its Compliance and Regulatory Affairs Division has occasionally encountered situations where registrants have reluctantly provided information regarding their manufacturing process and procedures. In this area especially, it is essential that full and complete cooperation be maintained between legitimate registrants and DEA. The firms indicate their apprehension is based on a fear that such information could eventually be obtained by their competitors through the FOIA. DEA 43.

200. In connection with bank fraud matters being investigated in a certain city, an auto dealer refused to furnish time cards of employees because he would violate the PA. FBI 13.

201. The disciplinary board of a state supreme court advised that, because of FOI/PA considerations, all requests for information by the FBI must be in letter form and a release authorization signed by the applicant must be enclosed with the request letter. It was intimated that a written request might not elicit all information if the disclosure could cause difficulties for the board. FBI 15.

202. On alleged privacy grounds, an international union will no longer provide information to law enforcement agencies unless served with a subpoena. FBI 16.

203. As association will no longer provide any information to law enforcement agencies or investigators unless served with a subpoena. This association has in the past assisted the FBI in coverage of aspects of the racing industry. The association has told the FBI that its current restrictive policy is the direct result of FOI/PA legislation. FBI 15.

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

APR 15 1982

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

The Drug Enforcement Administration recently completed an in-depth study of the impact of the Freedom of Information Act (FOIA) on the agency's enforcement efforts. This study was prepared at the request of Jonathan Rose, Assistant Attorney General for Legal Policy. In view of the importance of this matter, I am enclosing a copy of the study for your review.

Notably, the study revealed that 85 percent of our Agent personnel find the FOIA to be inhibiting their operations. Overall, 14 percent of our investigations are adversely affected by the FOIA to the extent that the cases are aborted; significantly compromised, reduced in scope; or require substantial additional work. Statistics are much more startling for the agency's high-level cases, which in the final analysis determine our impact on illegal drug trafficking.

Our study was based upon a statistically valid random sample of all cases initiated in 1980. Unfortunately, we could not measure lost opportunities or quantify cases never developed because persons failed to provide information on criminal activity for fear of FOIA exposure. We believe, however, that such lost opportunities may far outweigh the adverse impact that was measured in the study.

Sixty percent of the FOIA and Privacy Act requests received by DEA originate within the criminal element. It appears rather clear that the criminal element is effectively utilizing the FOIA at the expense of DEA operations and to the detriment of the general public.

I hope that the enclosed study will provide a greater understanding of the extent to which the Drug Enforcement Administration is being adversely affected by the FOIA.

Sincerely,

Francis M. Mullen, Jr.
Acting Administrator

Enclosure

THE EFFECT OF THE FREEDOM OF INFORMATION ACT ON DEA INVESTIGATIONS

Prepared by
Management Analysis Division
Office of Planning & Evaluation

February 5, 1982

SUMMARY

At the request of the Assistant Attorney General for Legal Policy, the Drug Enforcement Administration (DEA) undertook a detailed analysis of the effect of the Freedom of Information Act (FOIA) on DEA's investigative operations.

The study, which was conducted by the Management Analysis Division within DEA, was undertaken in two phases. In Phase I, an effort was made to identify the range of FOIA-related problems as reported by DEA field offices. Field offices were asked to identify recent FOIA-related problems and to prepare case summaries documenting the effect of the FOIA on specific investigations.

In Phase II, 400 DEA investigations were randomly sampled and reviewed in order to measure the extent to which the problems identified in Phase I appeared throughout the broad spectrum of DEA investigations.

From the information collected, the following major findings were developed:

- *85 percent of the DEA's Agents considered the FOIA to be inhibiting their operations.*

- *14 percent of DEA's investigations were adversely affected by FOIA-related problems to the extent that the investigations were aborted, significantly compromised, reduced in scope, or required significant amounts of additional work.*

- *35 percent of DEA's Agents believed that defendants had knowledge of investigative techniques being used during the investigations. In nearly 20 percent of the investigations, this knowledge appeared to have been gained through the FOIA.*

- *78 percent of DEA's investigations (303 cases) involved the recruitment and use of confidential sources. Of this total:*

  a) 47 percent of the enforcement investigations involved difficulty obtaining information from witnesses or defendants. Sixteen percent of these problems were directly attributed to the FOIA.

  b) 26 percent of the enforcement investigations involved a reluctance or an unwillingness on the part of informants to cooperate with DEA. One-third of the instances were directly attributed to the FOIA.

The analysis revealed a dramatic difference in the FOIA-related impact between DEA's high-level and low-level investigations. In every instance, the problems directly attributed to the FOIA significantly increased with the sensitivity of the investigation.

This study focused on only investigations that were actually initiated. No insight was gained as to the opportunities lost on investigations that were not developed because persons failed to come forward with information for fear of FOIA exposure. In the final analysis, the loss of such investigative opportunities may far outweigh the adverse effects revealed in the study.

Previous study has shown that more than 60 percent of the FOIA and Privacy Act requests received by DEA originate from within the criminal element. Thousands of pages of DEA reports containing routine investigative practices and procedures have been made available to those who would use the information to circumvent the law. Although the FOIA allows the withholding of sophisticated investigative techniques, the widespread distribution of DEA reports and other materials has educated many criminals at the expense of DEA and to the detriment of the general public.

Key summary statistics for the study are graphically presented in Figures 1-4, pp. 15, 16, 22, and 24.

INTRODUCTION

BACKGROUND

In July 1981, DEA undertook a detailed analysis of the effect of the FOIA on DEA's investigative operations. Since 1977, reports had been received from various DEA field offices suggesting that the FOIA was adversely affecting various types of DEA investigations. Nearly all of these reports indicated that the FOIA-related effect on criminal investigations, on DEA's relations with the private sector, and on the relationship between DEA and state and local police departments was primarily the result of the inability of the Federal government to offer credible assurances of confidentiality.

The FOIA was enacted in 1966 to allow any person to request any record from a Federal agency. The statute, however, included nine exemptions which were intended to serve the protectable interests of the Federal government, private financial interests, and individual privacy rights. In 1974, the law was significantly amended to require Federal agencies to comply with strict procedures in the administrative handling of FOIA requests and to make available certain previously exempt information relating to national defense and foreign policy as well as Federal law enforcement operations.

As currently written, the FOIA allows Federal law enforcement agencies to withhold information if it is part of an investigative record compiled for law enforcement purposes, but only to the extent that its disclosure would:

--Interfere with enforcement proceedings.

--Deprive a person of a right to a fair trial or an impartial jurisdiction.

--Constitute an unwarranted invasion of personal privacy.

--Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

--Disclose investigative techniques and procedures.

--Endanger the life or physical safety of law enforcement personnel.

However, reports received from DEA field offices over the past 5 years suggested that the law was having a detrimental effect on enforcement efforts. DEA then initiated a study to measure the impact of the FOIA to the agency's overall enforcement efforts.

METHODOLOGY

In order to ascertain both the nature and the extent of the problem, a two-part analysis was conducted. In Phase I the range of problems associated with the FOIA was identified. In July 1981, all DEA field offices were requested to prepare case studies that documented the effect of the FOIA on specific investigations. The request sought to identify

only the more dramatic instances of FOIA-related interference. Each DEA field office was specifically requested to identify FOIA-related difficulties encountered at any stage of an investigation, including: 1) difficulty in obtaining information from individual witnesses, 2) difficulty in obtaining information from the private sector, 3) reluctance of state and local police to share information, 4) refusal or reluctance of informants to cooperate with DEA Agents, 5) defendants' knowledge of investigative techniques, and 6) the apparent knowledge and/or previous use of the FOIA by defendants or witnesses.

Agents were requested to supply file numbers for the cases in which the foregoing problems were encountered and to indicate the effect on the outcome of the investigations. These reports, as well as previous reports submitted to DEA Headquarters are summarized in Appendix A.

In Phase II of the study, an effort was made to quantify the extent to which the problems identified in Phase I appeared within the various types of DEA investigations. Since the significance of FOIA-related problems could only be fully understood when the magnitude was made known, this part of the analysis placed the problem within the context of DEA's total investigative effort.

In order to conduct Phase II of the analysis, a statistically valid, stratified random sample of approximately 400 investigations was selected from the 8,576 domestic investigations initiated in 1980. Many of the cases randomly selected were comparatively minor investigations that

supported other large ongoing conspiracy investigations. However, the cases reviewed reflected overall the distribution of all DEA investigations. The distribution of the geographically stratified sample is shown in Table 1.

TABLE 1

Distribution of Sample Investigations by Type and Sensitivity of Investigation

	Sample	
Type of Investigation	Number	Percent
Enforcement	250	64%
State and local task force	76	19
Compliance	57	15
Other	9	2
TOTAL	392	100%
Sensitivity of Investigation		
High-level investigation (Class I and II)	81	21%
Low-level investigation (Class III and IV)	243	62
Other	68	17
TOTAL	392	100%

For each investigation selected, the file number, type, and level of investigation were noted on questionnaires which were transmitted to the Special Agent/Compliance Investigator who directly handled the case. The questionnaires (Appendix B) contained detailed questions related to the accessibility of information from defendants, witnesses, informants, state and local law enforcement agencies, and the private sector. In an effort to isolate FOIA-related problems from other variables that were considered

to inhibit the exchange of information, case agents were asked whether they were able to attribute the noted difficulties to the FOIA. Although many respondents volunteered information concerning FOIA-related problems in other investigations, only responses pertaining to investigations selected in the sample were considered. The responses are tabulated and summarized in Appendix C.

For the purpose of this study, no distinction was made between FOIA disclosures and other disclosures made under the Privacy Act (5 USC 552a). Although the majority of DEA requests for access are from individuals in the criminal element seeking information concerning themselves and are technically Privacy Act requests, Department of Justice regulations (28 CFR 16.57) require that Privacy Act requests be processed pursuant to provisions of the FOIA. The distinction between the two laws is insignificant in terms of the problems discussed in this study.

ANALYSIS

GENERAL FINDINGS

DEA Agents participating in the study clearly indicated that information disclosures made pursuant to the FOIA and the Privacy Act are adversely affecting their investigative efforts. Agents reported that intelligence information is not nearly so forthcoming as similar information prior to the enactment of the 1974 amendments to the FOIA. Table 2 summarizes these findings.

TABLE 2

Effect of the FOIA on DEA Operations
Special Agent Survey

FOIA Impact	No Effect	Adverse Effect		
		Some	Substantial	Total
Inhibits the private sector from providing information to DEA	16%	33%	51%	84%
Inhibits informants, witnesses or defendants from cooperating with DEA	22%	38%	40%	78%
Inhibits states and local law enforcement officials from sharing information with DEA	30%	45%	25%	70%
Inhibits DEA operations	14%	47%	39%	86%

Agents overwhelmingly identified the FOIA as a major factor inhibiting cooperation between DEA and state and local law enforcement agencies, witnesses, informants, and the private sector. Eighty-six percent of the Special Agents responding to the survey indicated that the FOIA inhibited DEA operations. Approximately half of these respondents perceived the effect to be significant.

On the basis of the information gathered from DEA Agents, it is clear that individuals and organizations familiar with the disclosure requirements of the FOIA are no longer coming forward, even to inform DEA Agents of their refusal to cooperate. Unfortunately, such information losses can probably not be quantified.

Nevertheless, a sufficient amount of information has been developed which suggests that serious problems arise from the inability of DEA to offer credible assurances of confidentiality.

Item - A district office in the southwestern United States reported that a potential informant against a major supplier is currently refusing to assist DEA. Subsequent to his arrest, the potential informant received information pertaining to his own case through an FOIA request and, as a result, was able to identify the informant who was responsible for his arrest. Since he was able to obtain such information about his own case, he is afraid that if he cooperates with DEA, anyone else arrested will be able to similarly identify him.

Item - One foreign police agency has become very cautious when information is requested that might impact on its informants despite assurances by DEA that the information furnished by the foreign police agency will not be disclosed by DEA through the FOIA. DEA officials believe that the FOIA has seriously damaged the cooperative efforts that previously existed.

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Since more than 60 percent of FOIA and Privacy Act requests received by DEA originate from within the criminal element, thousands of pages of DEA reports containing investigative practices and procedures have been made available to those who would use the information to circumvent the law. Although the FOIA allows the withholding of sophisticated investigative techniques, the widespread distribution of DEA reports appears to have educated many criminals.

Item - After receiving information pursuant to the FOIA, a prison inmate contacted his associates who were still under investigation. Shortly thereafter, the associates modified their operations and changed their telephone numbers, their residences twice, and sold their aircraft and motor vehicles.

Finally, in some instances, information released pursuant to either the FOIA or Privacy Act, has caused investigations to be prematurely terminated.

Item - A businessman who is a principal suspect in a major investigation involving the use of an aircraft leasing company, learned of DEA's investigation through an FOIA request which he had made to another Federal agency. The case was soon thereafter aborted.

Item - A DEA undercover investigation involving a reported organized crime figure was significantly compromised when an apparent FOIA release from another agency to another member of the same criminal organization revealed the existence of DEA's ongoing investigation. The criminal activity immediately declined; a decision regarding prosecution is currently pending.

The above examples typify the effect of the FOIA as reported by DEA Agents over the past 5 years. Although some reports are able to link the problems directly to documents disclosed pursuant to the FOIA, most of the

difficulties experienced by DEA Agents involve the reluctance of individuals to cooperate with DEA during the course of a criminal investigation for fear that their identity would ultimately be made known to the criminal element.

The extent to which these FOIA-related impediments are adversely affecting DEA investigative operations is indicated by the responses of DEA Agents to the survey questionnaire. In 14 percent of the cases surveyed, DEA Agents indicated that the FOIA-related problems significantly affected the outcome of the investigation. Table 3 summarizes the effect of the FOIA on a sample of approximately 400 DEA investigations.

TABLE 3

DEA Investigations Adversely Affected by the FOIA

FOIA Impact	Number	Percent	Percent of Surveyed Investigations
Investigation aborted or significantly compromised	5	10%	1%
Investigation reduced in scope	22	42	6
Significant amount of additional work required to overcome FOIA-related problems	25	48	7
Total investigations significantly affected by the FOIA	52	100%	14%

N=370 Investigations

As is reflected in Table 3, in over half of the cases reporting an FOIA-related impediment, the investigation was aborted, significantly compromised, or reduced in scope. The remainder of the affected investigations required a significant amount of additional work by DEA Agents and Compliance Investigators to overcome the FOIA-related problems, thereby diverting scarce resources from DEA's total investigative effort.

SPECIFIC FINDINGS

Although 14 percent of the DEA Agents surveyed indicated that problems associated with the FOIA significantly affected the outcome of their investigation, responses to specific questions suggest that the cumulative impact of related problems is far greater. While the problems encountered during a specific investigation may not directly affect the investigation's outcome, the overall problems related to the FOIA appear to be clearly contributing to a general diminution of criminal intelligence information furnished to the agency.

I. Cooperation from Witnesses, Defendants, and Informants

"Decreases in the number of informants have been reported; it is believed by many that potential informants do not come forward out of fear of disclosure through FOIA requests from persons they had helped convict. Even though their informant identities are exempt from disclosure, informants fear they will become known through agency error or release of ancillary information on details of the informant's role in the investigation."

- Attorney General's Task Force on Violent Crime
August 17, 1981

Item - DEA Agents identified the FOIA as directly responsible for the loss of two informants in an investigation involving large quantities of marihuana cultivation and distribution. The defendants in the case began

submitting FOIA requests during the course of the investigation with the express purpose of identifying informants and determining the extent of DEA's investigation. These requests were made known to all of the criminal associates, causing the informants to leave the area because they feared for their lives. The defendants were ultimately acquitted.

Item - In a methamphetamine investigation, an informant was in possession of information that could have led to the indictment of eight persons under investigation. However, the informant refused to testify or give DEA a written statement, specifically citing the FOIA and his fear of disclosure. Without cooperation from the informant, the methamphetamine lab was not located and the primary violators escaped prosecution.

As distinct from many types of criminal investigations, information supplied to DEA Agents from confidential sources is often the most important aspect of a narcotics investigation. Inasmuch as the investigative effort is directed at observing and apprehending violators while the criminal activity is taking place, the receipt of reliable criminal intelligence information is essential.

Seventy-eight percent of the investigations surveyed (303 cases) involved the recruitment and use of confidential sources. In 43 percent of the 303 investigations involving confidential sources, DEA Agents reported difficulty in obtaining information from witnesses or defendants. In 23 percent of the 303 investigations, DEA informants expressed a reluctance to fully cooperate. DEA Agents were able to attribute approximately 30 percent of these difficulties to the FOIA.

Table 4 reveals that in nearly one-half of the enforcement investigations requiring the use of confidential sources, DEA Agents experienced diffi-

culty in acquiring information from witnesses or defendants. Informants expressed a reluctance or an unwillingness to cooperate with DEA Agents in more than one-fourth of the enforcement investigations surveyed.

TABLE 4

Investigations with Difficulty in Acquiring Information from Confidential Sources

Type of Case	Number	Cases Involving Witnesses/ Defendants	Informants
Enforcement	212	47%	26%
State and local task force	67	33	18
Compliance	18	33	0
Other	6	33	33
TOTAL	303	43%	23%

Table 4 indicates that these difficulties were also experienced to a lesser, though significant extent during the course of investigations conducted by joint DEA and state and local task forces. As distinct from enforcement and state and local task force investigations, a much smaller percentage of DEA's compliance investigations require the use of confidential sources. Nonetheless, in one-third of these investigations (six cases), witnesses or defendants were reluctant to cooperate with DEA.

Since the majority of DEA investigations do not go to trial, the nature of the cooperation provided by most confidential sources is never fully made known to the violators. However, since the enactment of the 1974

amendments to the FOIA, a significant number of persons possessing relevant information has expressed a fear that the details of their cooperating with DEA would be revealed.

It should be noted that the fear of merely being identified as a cooperating source is not always the inhibiting factor; the disclosure of DEA investigative reports often chronicle the precise nature and extent of the cooperation, information often deemed much more important by potential sources.

Item - The head of a large organization who was involved in the trafficking of multiton quantities of marihuana was indicted and arrested for income tax evasion. During plea bargaining negotiations with another member of the organization, the defendant/witness indicated that he had made a FOIA request to DEA in 1980, from which he was able to deduce the identity of the confidential informant. Although the name of the informant was expunged from the documents, Justice Department policy precluded DEA from withholding information relating to the undercover purchase of evidence involving a defendant/FOIA requester, a Special Agent, and an informant when all three participants were known to one another. The defendant/witness presented copies of excised DEA reports to the case agent, indicating that assurances of confidentiality were obviously insufficient.

Table 5 indicates that 15 percent of the witnesses or defendants and 31 percent of the informants who were reluctant to cooperate with DEA Agents attributed their reluctance to the FOIA.

TABLE 5

Percentage of Investigations in which Difficulty in Acquiring Information is Attributed to the FOIA

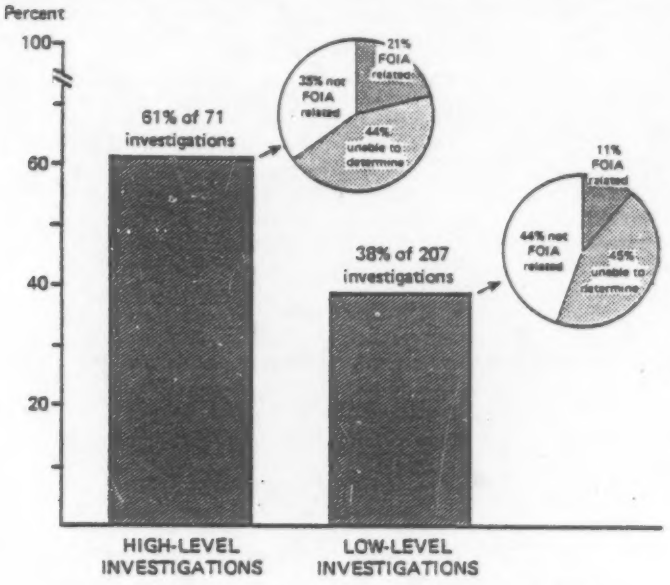
Confidential Sources	Cases Involving Difficulty Acquiring Information	FOIA-Attributed		
		Yes	No	Unable to Determine
Witnesses/ Defendants	43	15%	42%	43%
Informants	23	31%	18%	51%

N=303 Investigations

Though these figures are highly significant, DEA Agents report that many more of those refusing to cooperate, but offering no explanation may in fact be intimidated by the FOIA. Approximately 60 percent of DEA's FOIA disclosures are made to the criminal element, which is the same population that supplies most of DEA's confidential sources. It is reasonable to assume that FOIA use by the criminal element is widely known by potential sources and contributes to their reluctance to cooperate to a greater extent than is actually reported.

The magnitude of the problem is evident when the sensitivity of investigations is analyzed. Figure 1 illustrates the significant difference that exists in the level of the cooperation of confidential sources when controlling for the sensitivity of the investigation. Difficulty was experienced in more than 60 percent of DEA's high-level investigations in acquiring information from witnesses or defendants--a problem evident in only 38 percent of the low-level investigations.

Figure 1 - Percentage of Investigations in which Witnesses or Defendants Were Reluctant or Unwilling to Fully Cooperate with DEA



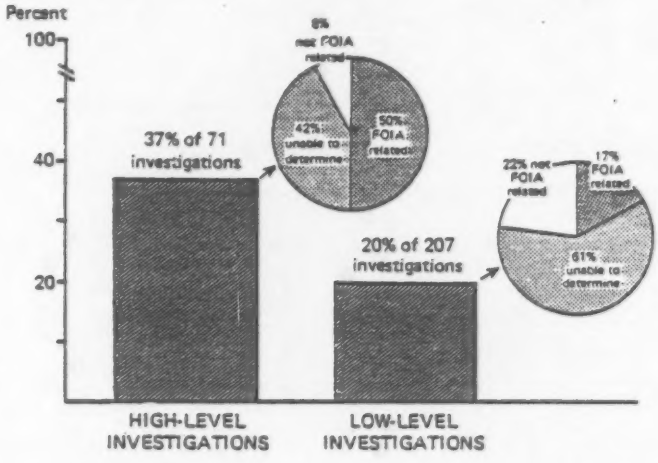
Source: Random sample of DEA investigations initiated during 1980.

Figure 1 also reveals that the percentage of investigations is significantly greater among DEA's high-level investigations. Twenty-one percent of the DEA Agents responding to the survey attributed difficulties in acquiring information from witnesses or defendants in high-level investigations to the FOIA, whereas this factor was identified in only 11 percent of the low-level investigations. More significantly, among those high-level investigations in which informants were reluctant to cooperate, DEA

Agents were able to attribute over 50 percent of these instances to the FOIA, while the law was identified as the cause of only 17 percent of the difficulties experienced in low-level investigations.

Similarly, Figure 2 shows that nearly 40 percent of DEA's high-level investigations involved recalcitrant informants, as compared to 20 percent for low-level investigations.

Figure 2 - Percentage of Investigations in which Informants Were Reluctant or Unwilling to Fully Cooperate with DEA



Source: Random sample of DEA investigations initiated during 1980.

The data presented in Figure 2 indicates that the problems encountered in acquiring information from informants are nearly twice as common in DEA's most sensitive investigations, suggesting that both disclosure of the informant's identity and possible retaliation are perceived as more likely

when dealing with high-level violators. Further, the data also suggests the existence of a widespread perception by informants that high-level violators are attempting to use the FOIA to discover their identity.

II. State and Local Enforcement Agencies

"Federal, state and local criminal justice agencies do not share intelligence information as freely as before the FOIA, possibly because of confusion over what is and is not covered by the Act or because of the enactment of similar state laws."

- Attorney General's Task Force on Violent Crime
August 17, 1981

Item - DEA Agents reported that officers of a major metropolitan police department assigned to work with DEA on investigations are not permitted to release any intelligence information to DEA that has been originated solely by that police department or their informants. In those instances were a formal request for information is made from DEA, the response is limited to providing summary data or deleted portions of police reports to the requesting DEA official.

Item - Another district office reports that a local police department has refused to divulge any information to DEA. Citing the possibility of having to reveal the source of their information at some time in the future, the local police department has stated unequivocally that it will not provide intelligence information.

The responses from DEA field offices indicate that the FOIA continues to affect the extent to which DEA has been able to obtain information from state and local police departments. However, many jurisdictions report that the information usually be obtained with very strictly controlled administrative procedures. Some DEA offices reported that information provided by a local police department to DEA is often heavily censored, revealing only minimal information. An example of a censored police report given to DEA by a major metropolitan police department is provided in Appendix D.

Nonetheless, some offices reported that, in circumstances such as those cases where the local agency and DEA are investigating the same criminal activity, the information possessed by the local agency is simply not available. In many instances, the restrictive policy of the local police department appears to be the result of a disclosure of confidential information that had been provided by the police department to a Federal agency.

Item - During an area-wide conference of organized crime intelligence units, local police voiced a reluctance to share intelligence information with Federal agencies because of the accessibility of the information through the FOIA. As part of their presentation, an example was cited in which local officials who had served a search warrant on an individual affiliated with organized crime, discovered that the individual had obtained an FBI report containing sensitive intelligence information that had been supplied by the local police to the FBI. Since that date, no intelligence information has been received from the local police department by the DEA office reporting the incident.

The reluctance of many state and local police departments to rely on DEA promises of confidentiality has had a debilitating effect on what was previously an efficiently functioning relationship between Federal, state and local governments. The restricted exchange of information often requires DEA Agents to develop the intelligence information that was previously forthcoming from the state and local agencies, thus greatly extending the time required to complete the investigation as well as duplicating information maintained by law enforcement officials.

Some DEA offices report that in those instances where DEA and the local police department are investigating the same crime, it is virtually impossible to obtain information, especially if it was originated by a local agency informant. As a result, DEA Agents have reported the existence of

two separate investigations simultaneously proceeding on both the Federal and local level, requiring the development of two distinct sets of evidence. The simultaneous investigation of defendants by DEA and the state and local authorities, aside from generating a significant waste in manpower and resources, also heightens the possibility that the ongoing investigation will be made known to those under investigation, since a significant increase in the amount of police work in the area is required.

III. Investigative Techniques

"Requests have been received for personnel rosters and investigative and training manuals of investigative agencies presumably to learn the investigation identities and the techniques the Federal government uses to capture offenders."

- Attorney General's Task Force on Violent Crime
August 17, 1981

Item - DEA Agents reported that a large scale investigation of a marihuana importation organization encountered FOIA-related difficulties at several junctures: 1) throughout the investigation, witnesses expressed fear for their lives when approached by case agents; 2) defendants were told by other members of the criminal organization that FOIA requests would enable them to identify anyone cooperating with the government; 3) a car rental agency initially refused DEA's request for evidentiary information; and, 4) the defendant in the case, represented by attorneys who had made previous FOIA requests, appeared to have been well aware of DEA's investigative techniques.

DEA Agents share a clear perception that investigative techniques and procedures are much more widely known by the criminal element than they were prior to enactment of the FOIA amendments in 1974. Since that time, DEA has repeatedly received FOIA requests for all of its operations manuals, as well as isolated requests for DEA training materials, vehicle and aircraft identification numbers, radio frequencies used by DEA, and

DEA Agents share a clear perception that investigative techniques and procedures are much more widely known by the criminal element than they were prior to enactment of the FOIA amendments in 1974. Since that time, DEA has repeatedly received FOIA requests for all of its operations manuals, as well as isolated requests for DEA training materials, vehicle and aircraft identification numbers, radio frequencies used by DEA, and descriptions of specific investigative practices and procedures. Information of this type, once released to an FOIA requester, is often distributed among the criminal element. Further, organizations advocating change in existing narcotics laws often support and assist in the distribution of information released through the FOIA. For example, the National Organization for the Reform of Marihuana Laws (NORML) recently published a special edition to its newsletter entitled "Excerpts from the DEA Agents Manual" (Appendix D). The release of this type of information, in conjunction with the release of hundreds of thousands of pages of investigative reports has apparently served to educate and enlighten the criminal element in many of the subtle aspects of DEA's undercover operations, including the use of informants, surveillance techniques, and the technical aspects of many of DEA's more sophisticated investigative techniques.

Overall, 35 percent of the DEA Agents responding to the survey indicated that they believed the DEA investigative techniques and operations were known to the subjects of the investigations. Of this total, 19 percent believed that this knowledge was gained through the FOIA. Table 7 summarizes the extent to which DEA Agents believed that their investigative techniques and operations were known to the subjects of enforcement, state and local task force, and compliance investigations.

TABLE 6

Investigations in which DEA's Sensitive Techniques and Operations were Known to Defendants

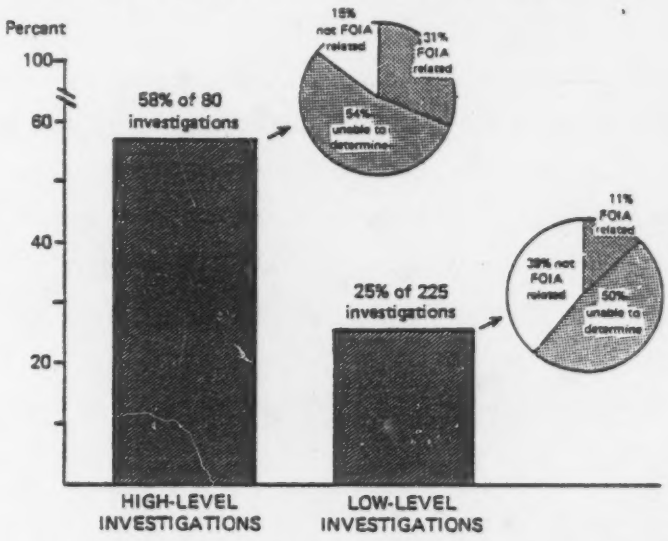
Type of Case	Number of Cases	Techniques Known to Defendants
Enforcement	234	37%
State and local task force	72	22
Compliance	43	39
Other	7	43
TOTAL	356	35%

In more than one-third of the enforcement and compliance investigations sampled, DEA Agents indicated that investigative techniques were known to the defendants, while similar reports were received from 22 percent of the state and local task force investigations surveyed. Of these investigations, DEA Agents indicated 21 percent of the enforcement, 13 percent of the state and local task force, and 12 percent of the compliance investigations were affected by the FOIA. In the majority of these cases, however, DEA Agents were unable to determine whether or not the FOIA was responsible for the defendants' awareness.

Figure 3 indicates the dramatic difference in the affect of FOIA-related problems on high-level and low-level investigations. DEA Agents reported that investigative techniques appeared to have been known by the defendants in 57 percent of DEA's high-level investigations, whereas similar findings were reported in only 25 percent of the low-level investigations.

Of this total, nearly one-third of the effect in the high-level investigations was attributed to the FOIA while only 11 percent of the effect in low-level investigations was so identified. Once again, most respondents indicated that they were unable to determine whether or not the FOIA was the principal cause of the problem.

Figure 3 - Percentage of Investigations in which DEA Investigative Techniques and Operations Appear to have been Known to Defendants



Source: Random sample of DEA investigations initiated during 1980.

IV. Sensitivity of Investigations

"In some Federal agencies, a considerable number of FOIA requests come from incarcerated offenders, presumably trying to identify informants or from organized crime figures and drug dealers seeking to find out what the government knows about them and their criminal activity."

- Attorney General's Task Force on Violent Crime
August 17, 1981

The extent to which FOIA-related problems affect DEA's more sensitive investigations is a continual finding. As was indicated, 14 percent of the DEA Agents surveyed reported that the FOIA had significantly affected the outcome of the sampled investigations. However, when isolating DEA's high-level investigations, 30 percent were significantly affected by the FOIA.

Figures 1 through 3 indicate the large differences between sensitive and nonsensitive investigations in the percentage of FOIA-related problems identified for each group and the extent to which those problems can be attributed to the law itself. Table 7 summarizes these differences.

TABLE 7

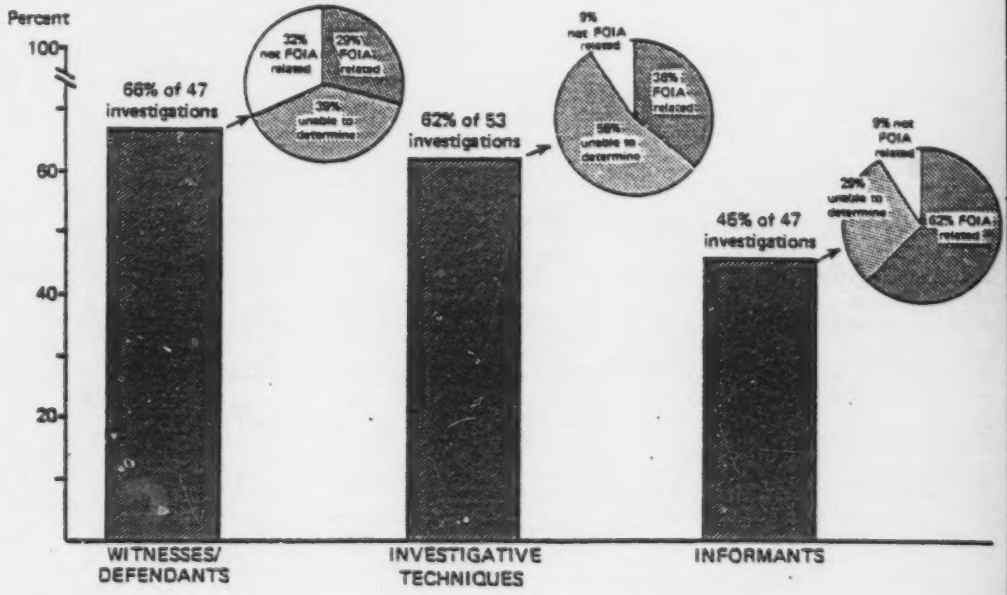
FOIA-Related Problems in DEA Investigations by Sensitivity of Investigation*

Problem	High-level Investigations	Low-level Investigations
Difficulty acquiring information from witnesses/defendants	61% (21%)	38% (11%)
Reluctance of informants to fully cooperate	37% (50%)	20% (17%)
Defendant knowledge of investigative techniques	58% (31%)	25% (11%)

*Figures in parentheses reflect the extent to which the problem was attributed to the FOIA.

When isolating DEA's most sensitive investigations, the effect is very significant. As shown in Figure 4, Agents in 66 percent of DEA's most sensitive investigations involving confidential sources experienced difficulty in acquiring information from witnesses or defendants (31 of 47 investigations), with this difficulty attributed to the FOIA in 9 of these cases (29 percent). Forty-five percent of these investigations (21 of 47 investigations) involved informants that were either reluctant or unwilling to fully cooperate with DEA and nearly two-thirds of these instances were attributed to the FOIA.

Figure 4 - Percentage of DEA's Most Sensitive Investigations (Class I) in which Confidential Sources Were Reluctant or Unwilling to Fully Cooperate with DEA and in which Investigative Techniques Appear to Have Been Known to Defendants



Source: Random sample of DEA investigations initiated during 1980.

Finally, in 62 percent of DEA's most sensitive investigations (33 of 53 investigations), Agents reported that DEA's investigative techniques and operations appeared to be known to defendants. Of this total, problems encountered in 12 of these investigations (36 percent) were attributed to the FOIA. Once again, it is noted that many Agents suggested that a large portion of the problems in which the cause was not specifically identified may actually be attributed to the FOIA.

This finding clearly suggests that FOIA-related problems are directly related to the sensitivity of the investigation. In every instance, both the level of difficulty and the percentage attributed to the FOIA are significantly higher in DEA's most sensitive investigations than they are in DEA's high-level investigations generally, which are more dramatically affected than are DEA's low-level investigations. These findings support the conclusion that the FOIA is a highly constraining influence in narcotics investigations.

V. Information from the Private Sector

Item - A DEA district office in the southern United States reports that during the past 2 years, the majority of motels and hotels in the coastal area have established a policy of refusing to allow law enforcement officers to even peruse their registration records informally without a subpoena. These businesses indicate that their attitude has been based on a fear of lawsuits emanating from the FOIA.

DEA's problems in obtaining information from the private sector have been somewhat tempered by the current practice of the agency's obtaining administrative subpoenas for much of the information required during the course of an investigation. While this has the unintended effect of minimizing the amount of voluntary information given to DEA investigators, it

generally results in the ability of DEA Agents to obtain specific information. However, DEA Agents report that the time required to identify the information desired and prepare an administrative subpoena or comply with other procedural requirements often limits the utility of the information when it is received.

Although DEA Agents reported that only 23 of the investigations surveyed experienced difficulty acquiring information from the private sector, more than one-third of them attributed this difficulty to the FOIA. Several offices reported that the procedural requirements also increase the chance that the investigation will be made known to those under investigation.

For example, one district office reported that, given the disclosure requirements of the Financial Privacy Act, DEA Agents were reluctant to request access to an individual's bank records at the outset of an investigation for fear that DEA's interest would be made known to the subject of the investigation. Similar problems exist with respect to the administrative subpoena of telephone toll receipts. The policy of the telephone company to advise individuals that their records have been furnished to DEA often alerts suspects of ongoing investigations.

Finally, the uncertainties associated with both Federal and state disclosure and privacy laws have inhibited the routine reporting of "suspicious activity" to Federal authorities. A DEA field office reported that an investigation was delayed by nearly 6 months because employees of a telegraph company had been reluctant to notify DEA that a high-level violator had for a long period been using the telegraph system to make fianancial arrangements for illicit shipments of controlled substances.

CONCLUSION

The Freedom of Information Act has had a significant adverse effect on DEA's operations. Many investigations are aborted, compromised, or reduced in scope because of FOIA exposure. A substantially larger number of investigations experience FOIA-related problems, that while not having a direct effect on the outcome of the investigation, significantly expands the efforts to overcome these problems and constitutes a significant drain on DEA's investigative resources.

The problems cited in this study are considerably greater in DEA's high-level investigations. Since these investigations involve significant resource commitments and substantially reflect upon the agency's performance, the overall effect of the FOIA far transcends any summary analysis presented in this study.

The net reduction in the amount of available intelligence information clearly has affected DEA's investigative potential. However, the full extent to which the FOIA has hampered investigation's remains uncertain. Many instances in which DEA is unable to determine the reason for the lack of cooperation may in fact be related to the FOIA.

The subject study focused only on investigations actually initiated. No accurate insight was gained as to the lost opportunity resulting from investigations not initiated and investigative leads not developed because persons failed to come forward with information for fear of FOIA exposure. In the final analysis, this lost opportunity may be the most significant effect of the FOIA on DEA's operations.

Appendix A

REPORTS OF FOIA-RELATED PROBLEMS FROM DEA FIELD OFFICES

A. General

- In a Miami case related to DEA's successful Operation Grouper, three of the defendants withdrew their guilty pleas after receiving information from DEA through the FOIA. The three were ultimately sentenced to the time they had served awaiting trial.

- A DEA undercover investigation involving a reported organized crime figure was significantly compromised when an apparent FOIA release from another agency to another member of the same criminal organization revealed the existence of DEA's ongoing investigation. The criminal activity immediately declined; a decision regarding prosecution is currently pending.

- DEA Agents reported that a large scale investigation of a marihuana importation organization encountered FOIA-related difficulties at several junctures: throughout the investigation witnesses expressed fear for their lives when approached by case agents; defendants were told by other members of the criminal organization that FOIA requests would enable them to identify anyone cooperating with the government; a car rental agency initially refused DEA's request for evidentiary information; and, the defendant in the case, represented by attorneys who had made previous FOIA requests, appeared to have been well aware of DEA's investigative techniques.

- In another investigation, a businessman believed by DEA to be a principal suspect in a major investigation involving the use of an aircraft leasing company learned of DEA's investigation through an FOIA request he had made to another Federal agency. The case was soon thereafter aborted.

- A district office reports that an Agent assigned to do a background investigation on a DEA applicant was told by two interviewees that they would not give information to the Agent if there was a possibility that the information they have would not be held in confidence. Though the interviewees personally felt that the government needed such information, the inability of the DEA Agents to absolutely guarantee their confidentiality resulted in their refusal to cooperate further.

B. Confidential Sources

- The head of a large organization that was involved in the trafficking of multiton quantities of marihuana was indicted and arrested for income tax evasion. During plea bargaining negotiations with another

member of the organization, the defendant/witness indicated that he had made an FOIA request to DEA in 1980, from which he was able to deduce the identity of the confidential informant. Although the name of the informant was excised from the documents, Justice Department policy precluded DEA from withholding information relating to the undercover purchase of evidence involving a defendant/requester, a Special Agent and an informant when all three participants were known to one another. The defendant/witness presented copies of excised DEA reports to the case agent, indicating that assurances of confidentiality were obviously insufficient.

- In two other recent cases, individuals expressed a reluctance to cooperate with DEA because of the possibility that their statements would be released through the FOIA. One of these individuals, arrested for trafficking in cocaine, possessed vital information concerning his criminal associates. The information was lost to DEA.

- A major trafficker in multiton quantities of marihuana made an FOIA request to DEA following his conviction in Federal court. The records, which contained FOIA-stamped reports that documented the defendant's cooperation with DEA, were distributed to the defendant's criminal associates in another state. The defendant is still anticipating possible repercussions from this action.

- A district office in the southwestern United States reports that a potential informant against a major source of supply is currently refusing to assist DEA. Subsequent to his arrest, the potential informant received information pertaining to his own case through an FOIA request and, as a result, was able to identify the informant who was responsible for his arrest. Since he was able to obtain this information in his own case, he is afraid that if he cooperates with DEA, anyone arrested as a result of his cooperation will similarly be able to identify him.

- In a methamphetamine investigation, an informant was in possession of information that could have led to the indictment of eight persons under investigation. However, the informant refused to testify or give DEA a written statement, specifically citing the FOIA and his fear of disclosure. Without cooperation from the informant, the methamphetamine lab was not located and the primary violators escaped prosecution.

- An investigation of a high-level narcotics violator was threatened when two confidential sources, with intimate knowledge of the organization, refused to cooperate or become established DEA informants. They both cited related personal experiences in which FBI files had been made public as a result of security leaks and the FOIA. Inasmuch as the credibility of these individuals has previously been established, their contribution to the investigation was essential.

- DEA Agents identified the FOIA as direcly responsible for the loss of two informants in an investigation involving large quantities of

marihuana cultivation and distribution. The defendants in the case began submitting FOIA requests during the course of the investigation with the express purpose of identifying informants and determining the extent of DEA's investigation. These requests were made known to all of the criminal associates, causing the informants to leave the area because they feared for their lives. The defendants were ultimately acquitted.

- A DEA informant with a west coast district office on a foreign investigation has expressed concern that his identity may be divulged through an FOIA inquiry. According to the informant, the many individuals and the numerous separate seizures and separate arrests involved in this investigation have led him to believe that anyone of the defendants, submitting an FOIA request, could receive information which would compromise his identity.

- One resident office was notified by a DEA informant that he possessed information regarding persons involved in the illegal distribution of cocaine. After initially cooperating, he notified DEA officials that because of the fact that information being supplied might be subject to release under the FOIA, he feared that his identity could become known and that his life would be placed in jeopardy if he continued his cooperation. The informant now refuses to fully cooperate with that office.

- A foreign district office reports that a well-placed cooperating individual refused to continue assisting DEA because he feared that his identity would be revealed through the FOIA. The informant, not an American citizen, is no longer working for DEA, and, though the investigation is still ongoing, chances for a successful culmination are greatly reduced.

- An increasing number of informants are, during the course of the investigation, asking DEA Agents for absolute guarantees of confidentiality. DEA Agents generally take the position that they will do all they can to assure confidentiality of a DEA informant; however, there can be no guarantees because the final decision in many of these matters lies with different officials, must be judged in different contexts, and sometimes falls under the jurisdiction of different agencies.

- One district office reports that a DEA informant, working on an investigation, terminated his cooperation because of his fear of public disclosure. Another district office contacted two informants who had previously cooperated with DEA and requested their cooperation in a current matter. Both individuals refused to cooperate because of their fear of being exposed through the FOIA. Finally, two additional district offices in the southwest report numerous instances of refusal to cooperate by potential informants who all cite the possibility of disclosure of their identities as a basis of their refusal.

C. State, Local and Foreign Governments

- DEA Agents reported that officers of a major metropolitan police department who are assigned to work with DEA on investigations are not permitted to release any intelligence information to DEA that has been originated solely by the police department or their informants. In those instances where a formal request for information is made from DEA, the response is limited to providing summary data or deleted portions of police reports to the requesting DEA official.

- A DEA district office similarly reported that the exchange of information between a northeastern state police department and the DEA has substantially declined during the past few years. While substantive information is generally provided to Federal law enforcement agencies, it is most often restricted only to certain facts contained in the report. Other details concerning the local agency investigation and the conclusions formed by the investigating officers are excised from the documents that are ultimately transferred to DEA. Once again, though the information generally responds to the request of DEA, a reduction in the exchange of raw intelligence information requires DEA to utilize its own resources to obtain that which was routinely forthcoming from the state police department.

- It should be noted, however, that the northeastern police department will not, in routine cases, provide DEA with information that was obtained by a confidential informant. Further, information that is not of an enforcement nature, such as information needed for DEA's responsibility to regulate the legitimate drug industry, is currently not being exchanged as was prior to the 1974 FOIA Amendments. The northeastern police department reported that if the information sought in licensing investigations is not in the form of a final disposition it will not be released. If a release of information is made to DEA, the information will be limited strictly to data relating to specific convictions, arrests, and case dispositions. Intelligence information is generally withheld.

  In order to ensure consistency in this area, requests for information from DEA are routed through a criminal records repository for the state, where such requests are reviewed and the appropriate content released.

- A cooperative system of investigative records which was developed between a DEA field office, a DEA Task Force, and the local city police department to coordinate narcotics investigations that had been initiated among any of the three participants, was forced to be turned over to the exclusive jurisdiction of the local police. Fearing that information contained in the system would ultimately become the subject of FOIA requests, the local police declared their intention to withdraw from the program. Since this withdrawal could have resulted in not only an adverse impact on the enforcement capability in the area, but

in the possible harm to individual law enforcement officials acting in an undercover capacity, DEA agreed to turn over full authority and custodial responsibility of the records system to the city. While there has not been a noted loss of efficiency in the system, it is strongly felt by DEA officials that this type of system fundamentally belongs under Federal control and that the transfer of the controls of this system to the local police somewhat diminishes DEA authority in this area.

- During an areawide conference of organized crime intelligence units, local police voiced a reluctance to share intelligence information with Federal agencies because of the accessibility of the information through the FOIA. As part of their presentation, an example was cited in which local officials, who had served a search warrant on an individual affiliated with organized crime, discovered that the individual had obtained an FBI report containing sensitive intelligence information that had been supplied by the local police to the FBI. Since that date, no intelligence information has been received from the local police department by the DEA office reporting the incident.

- A western field office reported having difficulty developing a case involving a criminal organization engaged in the illicit diversion of drugs totaling more than 800 million dollars annually, and believed to be directly linked to organized crime. The case is stalled, in large part, because the police department has refused DEA access to an informant who allegedly possesses crucial information because of the potential for disclosure in an FOIA request.

- An eastern district office reports that in one instance, as a DEA Agent spoke with an officer of a foreign government, it became apparent that the officer refused to divulge information he received from an informant for fear that the informant's identity would not be protected by DEA against an FOIA inquiry.

- Another district office reports that a local police department has refused to divulge any information to DEA. Citing the possibility of having to reveal the source of its information at sometime in the future, the local police department has unequivocally stated that it will no longer reveal its intelligence sources.

- A major DEA task force, an operation which for many years has successfully incorporated the practice of cooperative state, local, and Federal investigative efforts is currently experiencing difficulty in obtaining intelligence information from the police department. The police department has prepared a document which must be signed by task force officers before any information will be exchanged. They further require tht the information received will be filed in a system of records either generally or specifically exempt under the Freedom of Information or Privacy Acts.

- DEA's El Paso Intelligence Center (EPIC), a joint intelligence operation involving those Federal agencies which have jurisdiction over the importation of illegal substances into the United States, has received word from a narcotics division of a local police department, that reports henceforth being sent to EPIC shall not be duplicated nor further distributed without its direct consent. While DEA remains legally responsible for requests for this type of information, any release is bound to further strain the working relations between EPIC and the local agency.

D. Private Sector

- A midwestern field office reported that, given the disclosure requirements of the Financial Privacy Act, DEA Agents are reluctant to request access to an individual's bank records at the onset of an investigation for fear that DEA's interest will be made known to the subject of the investigation. Similar problems exist with respect to the administrative subpoena of telephone toll receipts.

- A southwestern field office reported that an investigation was delayed by nearly 8 months because telegraph company employees were reluctant to notify DEA that a high-level violator had been using the company to make financial arrangements for illicit shipments of controlled substances for a lengthy period of time.

- A west coast district office reports that several national companies have refused to give information regarding former employees who are seeking employment with DEA. When asked for the reasons in their change of policy, the FOIA was cited.

- A southern district office of DEA reports that during the past 2 years the majority of motels and hotels along the coastal area have established a policy of refusing to allow law enforcement officers to even peruse their registration records informally without a subpoena. These businesses indicate that their attitude has been based on a fear of lawsuits emanating from the FOIA.

- Another district office reports that its Compliance and Regulatory Affairs Division has occasionally encountered situations where registrants have reluctantly provided information regarding their manufacturing processes and procedures. In this area especially, it is essential that full and complete cooperation be maintained between legitimate registrants and DEA. The firms indicate their apprehension is based on a fear that such information could eventually be obtained by their competitors through the FOIA.

- A midwestern district office reports that after serving a subpoena to a bank for Bank Americard records of a co-conspirator in an investigation, an official of the bank advised that under the auspices of the FOIA, he was advising the subject of the investigation that DEA had

subpoenaed the bank's records. The bank official mistakingly cited the FOIA and his belief in the customer's "right to know" as reason for advising the subject of the subpoena.

- After receiving information pursuant to the FOIA, a prison inmate contacted his associates who were still under investigation. Shortly thereafter, the associates modified their operations and changed their telephone numbers, their residences twice, and sold their aircraft and motor vehicles.

- One foreign police agency continues to be very cautious when information is requested that may impact on its informants or is of a particularly sensitive nature, despite assurances by DEA that the information furnished by the foreign police agencies will not be disclosed by DEA through the FOIA. However, it is the opinion of DEA officials that the FOIA has seriously damaged the cooperative efforts that previously existed.

Appendix B

FREEDOM OF INFORMATION ACT SURVEY

File No:_____ Type Case:_____ Respondent's Name:_____

In July of this year, Congress began a series of hearings which are anticipated to thoroughly examine the impact of the Freedom of Information Act (FOIA) on the administration and operation of the Federal Government. In preparation for these hearings, the Department of Justice has requested DEA to assess the impact, if any, that the FOIA has had on DEA operations.

As a first step in the analysis, DEA field offices were asked last month to identify cases which documented difficulties encountered in various investigations as a result of the FOIA. Where FOIA-related difficulties were identified, offices were requested to indicate the impact on the outcome of the investigation. Since the responses received from the field offices clearly indicated that problems related to the free exchange of information are present in a significant number of instances, a second phase of the analysis is now being undertaken which will attempt to measure the extent to which these problems are occurring.

The file number at the top of this page was among approximately 400 cases randomly selected from a list of all DEA file numbers initiated during 1980. Part A of this questionnaire pertains to the specific investigation that is noted above, while Part B seeks general responses. Comments, in each instance, are optional.

I am asking each SAIC to distribute each questionnaire to the appropriate case agent/investigator or supervisor who should complete the questionnaire and forward it to DEA Headquarters, Management Analysis Division, Room 903, by September 11, 1981. I recognize that this represents additional tasking for the field; however, your responses to the questions contained in this questionnaire are of vital importance in our effort to secure amendments to the Freedom of Information Act. Should you have any questions, do not hesitate to telephone Richard Smith or Jeff Kurtz at FTS 633-1064. Thank you for your cooperation.

Marion W. Hambrick, Assistant
Administrator for Operations

PART A: The following questions refer to the investigation indicated above. Please check the appropriate answer.

1. Status of investigation: 1)Active____ 2)Officially Closed____ 3)Pending___

2. Did this investigation involve the recruitment or use of confidential sources or witnesses or contact with a State or local law enforcement agency?

1)Yes _____ 2)No ____

3. In this investigation, was there difficulty in acquiring information from witnesses or defendants?

1) Yes_____ 2) No_____

4. If yes, was this difficulty attributed to the Freedom of Information Act?

1) Yes_____ 2) No_____ 3) Unable to Determine_____

Comments:

5. In this investigation, was there difficulty in acquiring information from the private sector (e.g., pharmaceutical firms, hotels, Western Union, etc.)

1) Yes_____ 2) No_____

6. If yes, was this difficulty attributed to the Freedom of Information Act?

1) Yes_____ 2) No_____ 3) Unable to Determine_____

Comments:

7. In this investigation, were State or local law enforcement officials reluctant or unwilling to share information with DEA?
1) Yes ____ 2) No ____

8. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?

1) Yes_____ 2) No_____ 3) Unable to Determine_____
Comments:

9. If informants were utilized in this investigation, were they reluctant or unwilling to fully cooperate with DEA?

1) Yes_____ 2) No_____

10. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?

1) Yes_____ 2) No_____ 3) Unable to Determine_____
Comments:

11. In this investigation, did it appear that DEA investigative techniques and operations were known to the defendants?

1) Yes_____ 2) No_____

12. If yes, do you think they were revealed through the Freedom of Information Act?

1) Yes_____ 2) No_____ 3) Unable to Determine_____

Comments:

13. What effect did FOIA-related problems have on the outcome of this investigation? 1)Investigation Aborted _____2)Investigation Significantly Compromised ____3)Scope of Investigation Reduced _____ 4)Significant Amount of Additional Work Required _____ 5)No Noted Effect _____

PART B: Below are some questions which will allow you to express your opinion of the Freedom of Information Act and its general impact on DEA operations. Each question will be followed by a positive and a negative answer and 5 possible responses in between. Assuming that number 5 represents the highest possible value and number 1 the lowest, please circle the appropriate number for each question.

14. To what extent has the Freedom of Information Act inhibited State and local law enforcement officials from sharing information with DEA?

Greatly inhibited - 5 4 3 2 1 - No noted effect

15. To what extent has the Freedom of Information Act inhibited witnesses, defendants or informants from cooperating with DEA?

Greatly inhibited - 5 4 3 2 1 - No noted effect

16. To what extent has the Freedom of Information Act inhibited DEA operations?

Greatly inhibited - 5 4 3 2 1 - No noted effect

17. To what extent has the Freedom of Information Act inhibited the private sector from providing information to DEA?

Greatly inhibited - 5 4 3 2 1 - No noted effect

18. General Comments:

FREEDOM OF INFORMATION ACT SURVEY RESPONSES

General Case Information	Response		No Response	
	Number	Percent [a]	Number	Percent [b]
Case region:				
Northeast	83	21%		
Southeast	75	19%		
South Central	92	24%		
North Central	58	15%		
Western	84	21%		
No response			7	2%
TOTAL	392	100%		
Case type:				
Enforcement	250	64%		
Task Force	76	19%		
Compliance	57	15%		
Not specified	9	2%		
No response			7	2%
TOTAL	392	100%		
Case class:				
Class I	54	14%		
Class II	27	7%		
Class III	165	42%		
Class IV	78	20%		
Other	68	17%		
No response			7	2%
TOTAL	392	100%		
Status of Investigation:				
Active	41	11%		
Officially closed	247	63%		
Pending	102	26%		
No response			9	2%
TOTAL	390	100%		

[a] Relative response percent.

[b] Absolute percentage for all cases surveyed.

Question	Response								No Response	
	Yes		No		Unable to Determine		Total			
(The following questions pertain to a specific investigation cited.)	Number	Percent a/	Number	Percent a/	Number	Percent a/	Number	Percent a/	Number	Percent b/
2. Did this investigation involve the recruitment or use of confidential sources or witnesses, or contact with a state or local law enforcement agency?	303	78%	86	22%	-	-	389	100%	10	2%
3. In this investigation, was there difficulty in acquiring information from witnesses or defendants?	139	34%	253	66%	-	-	382	100%	17	4%
4. If yes, was this difficulty attributed to the Freedom of Information Act?	19	15%	54	43%	55	43%	128	100%	271	68%
5. In this investigation, was there difficulty in acquiring information from the private sector (e.g., pharmaceutical firms, hotels, Western Union, etc.)?	23	6%	351	94%	-	-	374	100%	25	6%
6. If yes, was this difficulty attributed to the Freedom of Information Act?	8	35%	1	4%	14	61%	23	100%	376	94%
7. In this investigation, were state or local law enforcement officials reluctant or unwilling to share information with DEA?	15	4%	357	96%	-	-	372	100%	27	7%

a/ Relative response percent.

b/ Absolute percentage for all cases surveyed.

Question	Response								No Response	
	Yes		No		Unable to Determine		Total			
	Number	Percent a/	Number	Percent a/	Number	Percent a/	Number	Percent a/	Number	Percent b/
8. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	2	13%	3	20%	10	67%	15	100%	384	96%
9. If informants were utilized in this investigation, were they reluctant or unwilling to fully cooperate with DEA?	69	22%	238	78%	-	-	307	100%	92	23%
10. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	21	31%	12	18%	34	51%	67	100%	332	83%
11. In this investigation, did it appear that DEA investigative techniques and operations were known to the defendants?	123	35%	233	65%	-	-	356	100%	43	11%
12. If yes, do you think they were revealed through the Freedom of Information Act?	23	18%	43	35%	58	47%	124	100%	275	69%

a/ Relative response percent.

b/ Absolute percentage for all cases surveyed.

Question	Response		No Response	
	Number	Percent [a]	Number	Percent [b]
13. What effect did FOIA-related problems have on the outcome of this investigation?				
Investigation aborted	3	1%		
Investigation significantly compromised	2	1%		
Scope of investigation reduced	22	6%		
Significant amount of additional work required	25	6%		
No noted effect	318	86%		
No response			29	7%
TOTAL	370	100%		
(The following questions pertain to general FOIA impact on DEA operations.)				
14. To what extent has the Freedom of Information Act inhibited state or local enforcement officials from sharing information with DEA?				
Greatly inhibited--5	28	7%		
4	66	17%		
3	121	32%		
2	52	14%		
No noted effect----1	115	30%		
No response			17	4%
TOTAL	382	100%		

[a] Relative response percent.

[b] Absolute percentage for all cases surveyed.

Question	Response		No Response	
	Number	Percent[a]	Number	Percent[b]
15. To what extent has the Freedom of Information Act inhibited witnesses, defendants or informants from cooperating with DEA?				
Greatly inhibited--5	49	13%		
4	101	27%		
3	107	28%		
2	36	10%		
No noted effect----1	85	22%		
No response			31	5%
TOTAL	378	100%		
16. To what extent has the Freedom of Information Act inhibited DEA operations?				
Greatly inhibited--5	50	13%		
4	98	26%		
3	136	35%		
2	46	12%		
No noted effect----1	52	14%		
No response			17	4%
TOTAL	382	100%		
17. To what extent has the Freedom of Information Act inhibited the private sector from providing information to DEA?				
Greatly inhibited--5	111	29%		
4	84	22%		
3	85	22%		
2	41	11%		
No noted effect----1	63	16%		
No response			15	4%
TOTAL	384	100%		

[a] Relative response percent.

[b] Absolute percentage for all cases surveyed.

Question	Type of Case																			
	Class I			Class II			Class III			Class IV			Other			Total				
	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Total
2. Did this investigation involve the recruitment or use of confidential sources or witnesses, or contact with a state or local law enforcement agency?	47	7	-	24	3	-	146	10	-	61	17	-	25	41	-	303	86	-	389
3. In this investigation, was there difficulty in acquiring information from witnesses or defendants?	31	33	-	12	15	-	55	111	-	27	50	-	8	54	-	129	253	-	382
4. If yes, was this difficulty attributed to the Freedom of Information Act?	9	10	12	0	5	7	7	23	20	2	11	14	1	5	2	19	54	55	128
5. In this investigation, was there difficulty in acquiring information from the private sector (e.g., pharmaceutical firms, hotels, Western Union, etc.)?	7	44	-	6	21	-	6	132	-	3	69	-	1	65	-	23	351	-	374
6. If yes, was this difficulty attributed to the Freedom of Information Act?	3	0	5	2	1	3	2	0	4	1	0	2	1	0	0	8	1	14	23
7. In this investigation, were state or local law enforcement officials reluctant or unwilling to share information with DEA?	3	51	-	1	23	-	7	154	-	4	66	-	1	61	-	15	357	-	372
8. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	0	1	1	1	0	0	1	0	6	0	2	2	0	0	1	2	3	10	15

U/D - Unable to determine.

Question	Type of Case																			
	Class I			Class II			Class III			Class IV			Other			Total			
	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Total
9. If informants were utilized in this investigation, were they reluctant or unwilling to fully cooperate with DEA?	21	29	-	5	19	-	31	111	-	10	51	-	2	28	-	69	238	-	307
10. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	13	2	6	0	0	5	7	5	17	0	4	6	1	1	0	21	12	34	67
11. In this investigation, did it appear that DEA investigative techniques and operations were known to the defendants?	33	30	-	13	14	-	45	113	-	11	57	-	21	30	-	123	233	-	356
12. If yes, do you think they were revealed through the Freedom of Information Act?	12	3	18	2	4	7	6	16	24	0	6	5	3	14	4	23	43	58	124

13. What effect did FOIA-related problems have on the outcome of this investigation?	Class I	Class II	Class III	Class IV	Other	Total
Investigation aborted	0	0	3	0	0	3
Investigation significantly compromised	0	0	1	0	1	2
Scope of investigation reduced	4	4	8	6	0	22
Significant amount of additional work required	12	2	8	1	2	25
No noted effect	31	21	137	68	61	318
TOTAL	47	27	157	75	64	370

U/D - Unable to determine.

Question	Type of Case															
	Enforcement			Task Force			Compliance			Not Specified			Total			
	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Total
2. Did this investigation involve the recruitment or use of confidential sources or witnesses, or contact with a state or local law enforcement agency?	212	36	-	67	9	-	18	39	-	6	2	-	303	86	-	389
3. In this investigation, was there difficulty in acquiring information from witnesses or defendants?	99	146	-	23	54	-	6	47	-	2	6	-	129	253	-	382
4. If yes, was this difficulty attributed to the Freedom of Information Act?	16	43	39	2	6	14	0	4	2	1	1	0	19	54	55	128
5. In this investigation, was there difficulty in acquiring information from the private sector (e.g., pharmaceutical firms, hotels, Western Union, etc.)?	20	215	-	2	72	-	1	56	-	-	8	-	23	351	-	374
6. If yes, was this difficulty attributed to the Freedom of Information Act?	5	1	14	2	0	0	1	0	0	0	0	0	8	1	14	23
7. In this investigation, were state or local law enforcement officials reluctant or unwilling to share information with DEA?	13	224	-	1	73	-	1	53	-	-	7	-	15	357	-	372
8. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	2	3	8	0	0	1	0	0	1	0	0	0	2	3	10	15

U/D - Unable to determine.

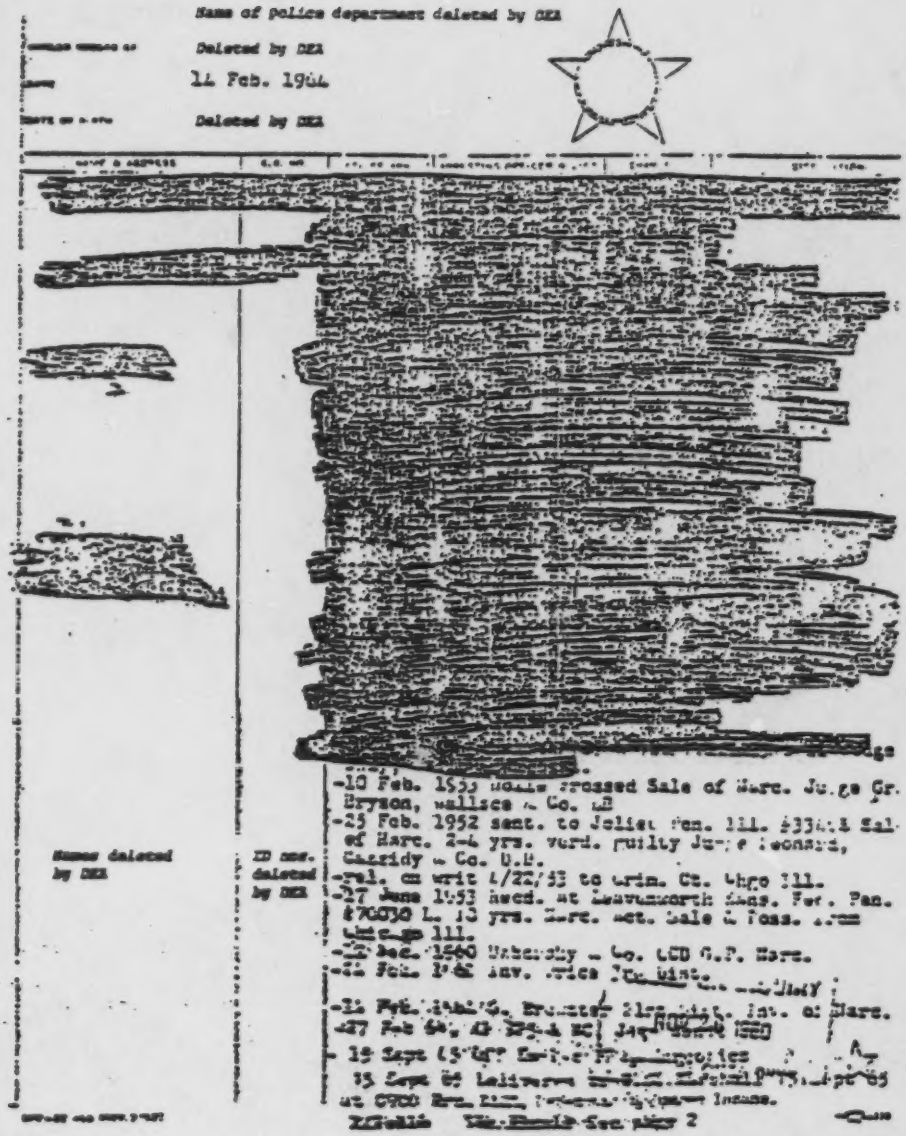
Question	Type of Case															
	Enforcement			Task Force			Compliance			Not Specified			Total			
	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Yes	No	U/D	Total
9. If informants were utilized in this investigation, were they reluctant or unwilling to fully cooperate with DEA?	55	153	-	12	56	-	-	23	-	2	4	-	69	236	-	307
10. If yes, was this reluctance or unwillingness attributed to the Freedom of Information Act?	19	8	26	1	3	8	0	0	0	1	1	0	21	12	34	67
11. In this investigation, did it appear that DEA investigative techniques and operations were known to the defendants?	87	147	-	16	56	-	17	26	-	3	4	-	123	233	-	356
12. If yes, do you think they were revealed through the Freedom of Information Act?	18	25	45	2	4	10	2	14	1	1	0	2	23	43	58	124

	Enforcement	Task Force	Compliance	Not Specified	Total
13. What effect did FOIA-related problems have on the outcome of this investigation?					
Investigation aborted	2	1	0	0	3
Investigation significantly compromised	1	0	0	1	2
Scope of investigation reduced	19	3	0	0	22
Significant amount of additional work required	21	2	1	1	25
No noted effect	189	69	54	6	318
TOTAL	232	75	55	8	370

U/D - Unable to determine.

Appendix D

CRIMINAL HISTORY REPORTS PROVIDED TO DEA FROM A METROPOLITAN POLICE DEPARTMENT



Name of police department deleted by DEA

Deleted by DEA

11 Feb. 1964

Deleted by DEA

Names deleted by DEA

ED mat. deleted by DEA

-10 Feb. 1953 [illegible] Sale of Narc. Judge Cr. Bryson, Wallace & Co. LD

-25 Feb. 1952 sent. to Joliet Pen. Ill. 4334.1 Sal. of Narc. 2-4 yrs. verd. guilty Judge Leonard, Cassidy & Co. D.P.

-rel. on writ 4/22/53 to Crim. Ct. Chgo Ill.

-27 June 1953 awed. at Leavenworth Kans. Fed. Pen. #70530 L. 10 yrs. Narc. act. Sale & Poss. [illegible] Chicago Ill.

-[illegible] Dec. 1960 University & Co. CCD G.P. Narc.

-[illegible] Feb. 1962 Inv. [illegible]

-[illegible] Feb. [illegible] Eruption Elec. Dist. Inv. of Narc.

-27 Feb 64, [illegible]

- 19 Sept 63 [illegible]

13 Sept 63 Delivered [illegible] at 0900 Fed. Pen. [illegible] Insane.

[illegible] Sec. 2

Name of police department deleted by DEA

[redacted] Deleted by DEA

DATE 13 March 1963

DATE OF [redacted] Deleted by DEA

[redacted] & ADDRESS	S.S. NO.	DATE OF ARREST, ARRESTING OFFICER & DIST.	CHARGES	DISPOSITION
Names deleted by DEA	ID nos. deleted by DEA	6 March1940 Off. Lynch 23 Dist. 29 Apr. 1940 1 yr. sus $4 Ch. 38 Judge Landesman Off. Lynch & Co. 23r Dist	[redacted]	
		[redacted]		
		[redacted]		
		- 20 Apr 65 Off Horvatic DIA5 H/S Agg Battery - 21 Jun 65 Agg Battery Kelle Battery 2 yrs Prob J. Ryan.		
		[redacted]		

Name of police department deleted by DEA

[redacted] Deleted by DEA

[redacted] 1-23-63

[redacted] Deleted by DEA

[redacted]

[redacted]	[redacted]	[redacted]	[redacted]
[redacted]			
Names deleted by DEA	ID nos. deleted by DEA	1-23-63 Corliss & C.. 000 Vice. 31 Jan63, 192-1. LFD, Judge Sullivan	
[redacted]			
[redacted]			
[redacted]			
[redacted]			
[redacted]			

THE·DRUG·LAW
Journal
A PUBLICATION OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS AND THE CENTER FOR THE STUDY OF NON-MEDICAL DRUG USE
SPECIAL SUPPLEMENT #5

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OCT 31 1980

EXCERPTS FROM THE DEA AGENTS MANUAL

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CHAPTER 63 LEGAL

Subchapter 633 Agent Authority, Rights, and Responsibilities

6331 AGENT AUTHORITY

A. Any officer or employee of DEA designated by the Attorney General and charged with enforcing the provisions of Public Law 91-513 is authorized by 21 USC 878 to:

1. Carry Firearms

2. Execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas and summonses issued under authority of the United States

3. Make arrests without warrants

a. For any offense against the United States committed in his presence,

b. For any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony.

4. Make seizures of property pursuant to the provisions of Public Law 91-513 (21 U.S.C. 878)

5. Perform such other law enforcement duties as the Attorney General may designate.

B. Moreover, the provisions of 28 C.F.R., Appendix B contain this delegation of authority to officers of DEA:

1. Criminal investigators (series 1811 under Civil Service Commission regulations) are authorized to exercise all of the powers of enforcement personnel granted by 21 U.S.C. 878, 873 and 879; to serve subpoenas, administer oaths, examine witnesses, and receive evidence under 21 U.S.C. 875; to execute administrative inspection warrants under 21 U.S.C. 880; and to seize property under 21 U.S.C. 881.

2. Compliance investigators (series 1810 under Civil Service Commission regulations) are authorized to administer oaths and serve subpoenas under 21 U.S.C. 875, to execute administrative

inspection warrants under 21 U.S.C. 878(2) and 880; and to seize property incident to compliance and registration inspections and investigations under 21 U.S.C. 881.

C. In addition to their authority under 21 U.S.C. 878 and 28 C.F.R. Appendix R, Federal officers have the right of arrest in the various States as citizens and sometimes officers. See 6641.5 and Appendix 66A.

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CHAPTER 63 LEGAL

Subchapter 635 Agent Authority, Rights, and Responsibilities

6352 AGENT RIGHTS

A. Section 1114 of Title 18 makes it a Federal offense to kill an officer of the Drug Enforcement Administration. The fact that officers of DEA are named in Section 1114 of Title 18 consequently includes them under the provisions of Section 111 of Title 18.

B. Section 111 of Title 18 makes it a Federal offense to forcibly assault, resist, oppose, impede, intimidate or interfere with an officer engaged in the performance of his official duties.

FOIA

E. Where an assault is committed on a DEA agent and the circumstances warrant the immediate arrest of the violator, the DEA agent may exercise his rights to make an arrest for a felony committed in his presence.

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CHAPTER 63 LEGAL

Subchapter 635 Agent Authority, Rights, and Responsibilities

6353 AGENT RESPONSIBILITY REGARDING RIGHTS OF CITIZENS

6353.1 CITIZENS' RIGHTS. The rights of a citizen are based on Section 241 and 242 of Title 18 of the United States Code which read, in part, as follows:

SECTION 241 - "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same...shall be fined not more than $5,000 or imprisoned not more than 10 years or both."

SECTION 242 - "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishment, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The above sections suggest appropriate conduct to protect agents against unfounded charges. They may also serve as a warning to agents to respect the rights of others, including criminals, for they, as citizens, enjoy the same protection under the Constitution.

FOIA

[redacted]

4353.3 PERSONAL LIABILITY OF AGENTS. Federal agents may be held personally liable for unconstitutional police practices which violate a citizen's rights, granting protection from false arrest and illegal search and seizure. (Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388).

The principal consideration in an agent's defense in such allegations is whether the agent's actions were accomplished in good faith and with reasonable belief that the action was lawful.

[redacted]

FOI

CHAPTER 66 ENFORCEMENT PROCEDURES

Subchapter 664 Arrests/Fugitives

6641 ARRESTS

FOI

6641.1 PROCEDURES—ARREST WITH WARRANT

6641.11 Obtaining Warrants. The agent most familiar with all aspects of the case will confer with the appropriate U.S. attorney regarding which method to use.

There are three means of obtaining an arrest warrant as discussed below:

A. Indictment by a Grand Jury. This may be used for felonies or misdemeanors. It involves the agent presenting testimony (facts need not be first-hand) before a grand jury to establish probable cause that a violation has taken place and that the subject committed it. If the grand jury finds sufficient probable cause, it will indict the subject, and the court will issue a bench warrant for the arrest of the subject.

6641.11

B. Information filed with the Court. This is usually used for misdemeanors. It involves the agent preparing a written affidavit setting forth probable cause that a violation has taken place (facts need not be first-hand).

The U.S. attorney's office prepares an information based on this affidavit, and files both documents with the court. If the court finds sufficient probable cause, it will issue an arrest warrant.

C. Complaint filed with U.S. Court or Magistrate. This may be used for felonies or misdemeanors. It involves the agent preparing a written complaint establishing probable cause that a violation has taken place (facts need not be first-hand) and that the subject committed it. If the magistrate finds sufficient probable cause, he must issue an arrest warrant.

FOI

6641.4

[redacted]

[redacted]

6641.5 ARRESTS FOR VIOLATIONS OUTSIDE DEA JURISDICTION.
Section 508(3) of the Controlled Substances Act provides "any officer or employee of DEA designated by the Attorney General may make arrests without warrant

"1. For any offense against the United States committed in his presence, or

"2. For any felony cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony."

[redacted]

FOIA

Appendix 668

DRUG ENFORCEMENT ADMINISTRATION
DOMESTIC OPERATIONS GUIDELINES

December 28, 1976
(Amended June 30, 1978)

The following guidelines are intended to promote efficiency in the operations of the Drug Enforcement Administration (DEA) and to improve coordination between DEA and other branches of the Department of Justice. The imposition of any sanction for failure to comply with these guidelines remains exclusively within the jurisdiction of the Attorney General and the Administrator of DEA, and such other persons as they may designate.

I. ENFORCEMENT ACTIVITIES

A. Objective

1. Enforcement activities are those procedures employed by DEA Special Agents intended to result in (1) the arrest, prosecution and incarceration of drug traffickers, (2) the disruption of illicit traffic, (3) the reduction of drug availability through seizure of drugs and equipment necessary for operation of drug networks, and (4) deterrent effects on other traffickers by discouraging continued or potential trafficking.

2. Enforcement activities shall be undertaken with the primary objectives of prosecuting individuals, or individuals acting in concert, who finance, control, or direct drug trafficking organizations, or of interdicting the flow of drugs from significant drug trafficking operations.

3. Enforcement activities of DEA include what are traditionally considered investigation activities and intelligence activities. For the purposes of these guidelines, investigation is defined as the process of gathering evidence primarily for the immediate purpose of initiating a criminal prosecution, or for the seizure of specific unlawful shipments of controlled substances. The term "investigation" as used in these guidelines is not intended to include investigations of "leads" originated by or furnished to DEA offices. For the purposes of these guidelines, intelligence is defined as information gathered in support of the mission of DEA which is not collected primarily for the immediate purpose of initiating a specific prosecution, but which may ultimately lead to prosecution of one or more individuals or the seizure of unlawful shipments of controlled substances.

release

4. DEA investigations often produce ancillary intelligence, and DEA intelligence activities often produ evidence useful in criminal prosecutions. Internal revie mechanisms provided for in these guidelines are not inten apply to sporadic intelligence activities; nor are such activities to be reported to the United States attorneys investigations under section XD of these guidelines. On other hand, the systematic gathering of information targ an individual or individuals, or on a drug trafficking o which continues for a period of 45 days should be consid an investigation within the meaning of sections IB, C, a relating to consultation with United States attorneys.

B. Initiating Enforcement Activities

1. Investigation may be initiated based on fa information indicating possible violation of the Control Substances Act or other laws within the investigative jurisdiction of the Drug Enforcement Administration.

2. In each investigation an initiation report be prepared by the Special Agent setting out the basis f investigation. Supervisory approval of anticipated enfo activity, including undercover operations, is required p any Special Agent or informant undertaking action.

C. Review and Continuation of Enforcement Activit

1. All review and approval for continuation enforcement activities as provided below shall be reduc writing.

2. An agent's immediate supervisor shall revi investigation within thirty (30) days after it is initi determine if further investigation is warranted.

(a) Investigations may continue beyond t (30) days where there is a clear indication of a violat within DEA's investigative jurisdiction. Investigation continue in accordance with other provisions of these guidelines.

(b) In the absence of a clear indication violation of law, the agent's immediate supervisor shal authorize continued investigation beyond thirty (30) da there is reason to believe the investigation may lead t

(i) prosecution of one or more individuals who finance, control, or direct a drug trafficking organization; or

(ii) interdiction of the flow of drugs from a significant drug trafficking operation (e.g., seizing a major shipment or processing laboratory).

3. An agent's immediate supervisor shall review all investigations continuing ninety (90) days after initiation to determine if further investigation is warranted. Investigation may continue beyond ninety (90) days only if there is:

(a) clear indication that investigation is likely to result in prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or disruption of significant drug trafficking,

(b) where there is no clear indication of significant prosecution or disruption of drug trafficking, investigation shall continue only with the written approval of the appropriate second-line supervisor.

4. If enforcement activity is discontinued pursuant to paragraph IC2 or 3 above, enforcement activity may be reinstituted at any time new information consistent with the standards of paragraph IC2 or 3 is received or developed.

5. SAIC's shall ensure that each DEA investigation is reviewed at an appropriate supervisory level six months after its initiation, and at six-month intervals for as long as investigation continues, and may authorize its continuation if the standard set forth in paragraph IC3(a) or (b) is met.

6. Upon completion of a six-month review SAIC's shall report to DEA Headquarters each investigation authorized to continue under IC3(b) above and shall set forth their reasons for continuing investigation.

7. SAIC's will be responsible for reporting to DEA Headquarters on all important intra and interregional investigations which indicate potential multiple prosecutions of important violators. DEA may impose additional review and reporting requirements consistent with these guidelines.

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b. Coordination with United States Attorneys

The purpose of this section of the guidelines is to insure that United States attorneys are advised of all major investigations for which they will have responsibility for prosecution.

1. The Drug Enforcement Administration shall insure that the appropriate United States attorney is advised of all investigations as soon as it appears to the first-line supervisory DEA agent that there is probable cause to make an arrest, even though no arrest is in fact contemplated. Additionally, in investigations where the subjects are believed to be part of a major drug trafficking organization, but probable cause to make an arrest has not yet been established, the notification of a pending investigation to the United States attorney shall be made by DEA at such time as it is determined that the subjects are part of a major drug trafficking organization. In no event shall notification of any "investigation," as defined in paragraphs IA1 and 4, be made to the United States attorney later than 45 days after its initiation. The United States attorney shall be consulted, shall assign an Assistant United States attorney if appropriate, and shall be furnished progress reports of the investigation at regular intervals to assure appropriate participation by prosecuting officials.

2. Investigations required to be reported to a United States attorney under paragraph IB1 which involve possible offenses prosecutable in more than one federal judicial district shall be reported to the Department of Justice, and to the appropriate United States attorneys. The Department shall be consulted and furnished progress reports on such investigations at regular intervals.

3. The United States attorney in each federal judicial district shall, consistent with Department of Justice guidance, determine policy regarding declinations and also the referral of prosecutions to State and local authorities.

4. The United States attorney shall, except in exigent circumstances, be consulted prior to the arrest of a defendant and again immediately after the arrest. The United States attorney shall be furnished a written report of the arrest no later than five (5) working days after the arrest. The provisions of this subparagraph shall not apply to arrests of

defendants who will be prosecuted in State or local courts, provided that such referrals for state or local prosecution are within the policy determinations and procedures of the United States attorney provided for in subparagraph 3, above.

5. In all cases of seizures without a search warrant, unless reported incident to arrest, a report in writing shall be submitted to the United States attorney not later than ten (10) working days after the seizure.

6. DEA shall, with due regard for the time necessary to prepare for trial, advise the prosecuting United States attorney of any compensation paid to, or other consideration furnished to, an informant or defendant-informant, as well as of any electronic surveillance relating to the case.

7. All relevant DEA case files and manuals will be available for review by U.S. attorneys on request. The U.S. attorney shall be responsible for insuring the security and confidentiality of materials furnished by DEA.

8. Department of Justice instructions to United States attorneys relating to these guidelines will be provided to DEA.

II. SOURCES, INFORMANTS AND DEFENDANT-INFORMANTS

A. General

1. A "source of information" is a person or organization furnishing information without compensation on an occasional basis (e.g., an observer of an event) or a company employee who obtains relevant information in the normal course of his employment), or a person or organization in the business of furnishing information for a fee and receiving only its regular compensation for doing so (e.g., a credit bureau).

2. An "informant" is a person who, under the specific direction of a DEA agent, with or without the expectation of payment or other valuable consideration, furnishes information regarding drug trafficking or performs other lawful services.

3. A "defendant-informant" is a person subject to arrest and prosecution for a federal offense, or a defendant in a pending federal or state case who, under the specific direction of a DEA agent, with an expectation of payment or other valuable consideration, provides information regarding drug trafficking or performs other lawful services.

4. Any individual or organization may be a source of information. Restrictions placed on the use of informants and defendant-informants are not applicable to sources of information.

5. Informants and defendant-informants are assets of DEA, and are not to be considered personal resources of individual agents. At least two (2) DEA agents should be in a position to contact an informant or defendant-informant, and whenever practicable two (2) shall be present at all contacts and interviews with informants and defendant-informants. Regular contacts shall be maintained with informants and defendant-informants.

6. Informants and defendant-informants shall be advised that they are cooperating with DEA, but are not agents or employees of DEA or the Federal Government. They shall be advised that information they provide may be used in a criminal proceeding. They may be told that DEA will use all lawful means available to maintain the confidentiality of their identity. Except in extraordinary circumstances they should not be assured that they will never be required to testify or otherwise have their identity disclosed in a criminal proceeding. In extraordinary circumstances they may be given this assurance after approval of the SAIC, provided the United States Attorney shall be notified of any such assurance given to any individual having information relevant to a pending investigation in advance of prosecution proceedings, including grand jury proceedings.

B. Informants

1. Only individuals who are believed able to furnish reliable enforcement information or other lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be utilized as informants.

2. Except as provided in paragraph III3, an agent must obtain the approval of his immediate supervisor prior to utilizing any informant. The approving supervisor should review the relevant data, including the criminal record, of any potential informant and ascertain whether he is the subject of a pending DEA investigation before deciding whether to approve him as an informant. Before the individual is asked to render services, in addition to supplying information, a more extensive investigation and evaluation of the individual shall be conducted. However, DEA may use an informant temporarily without extensive investigation where a second-line supervisor determines that lack of sufficient time precludes such investigation.

3. Individuals in the following categories represent particular risks as informants, and their use for an initial ninety (90) days may be utilized only as authorized below:

(a) individuals who are less than eighteen (18) years of age, with the written consent of a parent or legal guardian, when authorized by the SAIC;

(b) individuals on Federal or State probation or parole, with the consent of the agency supervising them, and complete documentation by DEA, when authorized by the SAIC;

(c) former drug-dependent persons, or drug-dependent persons participating in an established drug treatment program when authorized by the SAIC;

(d) individuals with two (2) or more felony convictions, when authorized by the SAIC; and

(e) individuals who have previously been declared unreliable by DEA, or any of its predecessors, when authorized by the Assistant Administrator for Enforcement.

4. The use of an informant shall be reviewed at least every ninety (90) days by the appropriate second-line supervisor, or the higher official indicated in paragraph III3 above. Use of the informant may be continued if it is determined, upon review of his background and performance, that he is qualified to serve in this capacity as provided in paragraph III1 above, and that he has the potential for furnishing information or services which it is believed will lead to the prosecution of one or more individuals who finance

control or direct a drug trafficking organization or the interdiction of significant drug traffic. The SAIC shall be responsible for review of the utilization of each informant at least every six months, and continued use of an informant shall be authorized if he is determined that he meets these standards. The SAIC shall be responsible for reporting all such decisions to DEA Headquarters.

5. Informants may be paid money or afforded other lawful consideration. All funds paid to informants shall be accounted for, and specific records shall be maintained of any non-monetary consideration furnished informants.

C. Defendant-Informants

1. Only individuals who are believed to be able to furnish reliable enforcement information or lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be used as defendant-informants.

2. In addition to the steps necessary to utilize an informant which are set forth in paragraph IIB, the approval of the appropriate United States attorney shall be obtained prior to seeking the cooperation of or utilizing a defendant-informant.

3. An individual approved as a defendant-informant may be advised that his cooperation will be brought to the attention of the appropriate United States attorney or other prosecutor. DEA agents shall make no other representations or recommendations without the express written approval of the SAIC.

4. The SAIC shall obtain the written approval of the Assistant Administrator for Enforcement prior to recommending dismissal of any criminal matter. The SAIC shall inform DEA Headquarters of any other information concerning a defendant-informant's cooperation, or advice offered regarding disposition of a case, or imposition of a penalty.

5. Use of defendant-informants shall be reviewed in the manner prescribed for other informants in paragraph IIB above, and their use may be continued only if they are found to meet the standards set forth therein.

D. Knowledge of Criminal Activity by Informants and Defendant-Informants

1. DEA shall instruct all informants and defendant-informants that they shall not violate criminal law in furtherance of gathering information or providing other services for DEA, and that any evidence of such violation will be reported to the concerned law enforcement authority.

2. Whenever DEA has reason to believe that a serious criminal offense outside its investigative jurisdiction is being or will be committed, it shall immediately disseminate all relevant information to the appropriate law enforcement agency.

3. Whenever DEA has reason to believe that an informant or defendant-informant has committed a serious criminal offense the appropriate law enforcement agency shall be advised by DEA, and the appropriate United States attorney shall be notified.

4. In disseminating information in accordance with paragraphs IID2 and 3 above, all available information shall be promptly furnished to the appropriate law enforcement agency unless such action would jeopardize an ongoing major investigation or endanger the life of a DEA agent, informant or defendant-informant. If full disclosure is not made for the reasons indicated, then limited disclosure shall be made by DEA to the appropriate authorities, to an extent sufficient to apprise them of the specific crime or crimes that are believed to have been committed. Full disclosure shall be made as soon as the need for the restrictions on dissemination are no longer present. Where complete dissemination cannot immediately be made to the appropriate law enforcement agency, DEA shall preserve all evidence of the violation for possible future use by the appropriate prosecuting authority. Nothing herein shall prevent full and immediate disclosure to the appropriate law enforcement agency if in DEA's judgment such action is necessary even though an investigation might thereby be jeopardized.

5. If DEA desires to continue making use of an informant or defendant-informant after it has reason to believe that he has committed a serious criminal offense, DEA shall advise the appropriate United States attorney, and a determination shall be made by him after consultation with the Chief of the Narcotics and Dangerous Drug Section of the Criminal Division of the Department of Justice, whether continued use should be made of the individual by DEA.

III. UNDERCOVER OPERATIONS

A. Undercover operations involve DEA agents who assume a fictitious identity or role on a temporary basis (often posing as individuals involved in drug trafficking), and/or the use of informants or defendant-informants under the direction of DEA, to obtain evidence or other information relating to violations of the Controlled Substances Act or other drug laws.

B. Undercover operations conducted by DEA may include employment of a ruse or deception, the provision of a facility or an opportunity, or mere solicitation that would not induce an ordinary, law-abiding person to commit an offense.

C. Undercover operations may be authorized where there is reason to believe use of this technique may result in evidence or information concerning significant drug trafficking activities. Undercover operations must be authorized by a Group Supervisor or Resident Agent-in-Charge. Such authorization must be written; however, in exigent circumstances documentation may be prepared after the undercover operation has been initiated, provided oral authorization has first been obtained. Authorizations for undercover operations shall set forth a description of the undercover operation and the provisions made for the protection of undercover agents or informants.

D. DEA may furnish an item necessary to the commission of an offense other than a controlled substance (i.e., a legal chemical essential to drug production), or may furnish services in furtherance of illegal drug trafficking which are difficult to obtain (i.e., sophisticated chemical expertise), upon the authorization of the SAIC, after consultation with the appropriate United States attorney and with DEA Headquarters. Activity such as furnishing a noncontrolled substance, or other services, may be authorized when there is strong reason to believe such activity will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation.

E. Undercover operations shall not include the furnishing of a controlled substance except in extraordinary cases after consultation with the appropriate United States attorney, when the Administrator of DEA determines that there is reason to believe such activity will lead to the prosecution of one or

more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation. In making such determination, the Administrator of DEA shall take into account the type and amount of drug involved; its likelihood of reaching consumers; the number and position in the drug-trafficking organization of subjects who have, and who have not, been sufficiently identified to be arrested; the type and amount of evidence necessary to complete the investigation; the time required to attempt to do so; and the likelihood of obtaining such evidence.

F. SAICs shall advise DEA Headquarters immediately if specific information is developed, in the course of an undercover operation or otherwise, regarding the shipment, delivery, or location of substantial amounts of controlled substances. In certain cases it may be appropriate not to seize such drugs in order to enhance the effectiveness of an investigation. DEA may continue an investigation without seizing substantial amounts of illicit drugs only when:

1. Authorized by the Assistant Administrator for Enforcement of DEA or his Headquarters designee. The Assistant Administrator for Enforcement shall consider the factors set forth in paragraph IIIE above, and may authorize the investigation to continue without seizure of the drugs in question if he makes the determinations set forth therein. His decision shall be reflected in writing.

2. Where immediate seizure of substantial amounts of controlled substances might result in compromise of an investigation of greater significance than seizure would warrant, or in the death or serious injury to a DEA agent, informant, or defendant-informant, an immediate decision may be made by the field agent or his supervisor, consistent with the safety of the agent, informant or defendant-informant. In such instances the Assistant Administrator for Enforcement shall be promptly notified.

G. While it is recognized that there is an inherent risk of violence in drug trafficking, undercover operations shall not include originating, encouraging, or planning to participate in violent activity. If in the course of an undercover operation there is a prospect of previously unanticipated violence, the agent, informant, or defendant-informant involved shall make

every effort consistent with his personal safety to prevent such violent activity and, to the extent he is not completely successful, to minimize the degree of violence and to avoid participation in it.

E. In conducting undercover operations DEA Special Agents, informants, and defendant-informants shall not attend meetings between defendants and their counsel if attendance can be avoided. If attendance cannot be avoided they shall not report anything they may overhear while present at meetings with counsel, unless they observe the commission of a crime.

F. Informants and defendant-informants used in undercover operations shall be advised of the standards established by these guidelines relevant to the activities they are asked to undertake on behalf of DEA.

IV. ELECTRONIC SURVEILLANCE AND RELATED TECHNIQUES

Electronic surveillance and related techniques may be employed as follows:

A. Interception of wire or oral communications through the use of any electronic, mechanical or other device ("wiretaps" or "bugs") in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the related Department of Justice instructions.

B. Recording telephone numbers dialed and related information by the use of "pen registers" and "touch tone decoders" pursuant to a Federal court order in the nature of a warrant issued under Rule 41 of the Federal Rules of Criminal Procedure.

C. Electronic tracking devices ("beepers") and transponders when authorized by a Group Supervisor or higher authority, and pursuant to a Federal court order in the nature of a warrant of the type issued under Rule 41 of the Federal Rules of Criminal Procedure if installation involves a trespass otherwise required by the Federal case law in the judicial district or districts involved.

D. Telephones and transmitters to monitor private conversations with the consent of a party to the conversation pursuant to the provisions of the Attorney General's "Memorandum to the Heads of Executive Departments and Agencies," dated October 26, 1972.

E. Photographic, optical (e.g., binoculars), electro-optical (e.g., night vision equipment), and television equipment as surveillance aids or for recording evidence, pursuant to the provisions of the DEA Agents Manual.

F. Electronic, magnetic, vibration sensors, and radar equipment to detect the movement of persons, vehicles, vessels, and aircraft pursuant to the provision of the DEA Agents Manual.

G. No other form of electronic surveillance or related technique may be utilized.

FOI

Subchapter 6130 Foreign Guidelines.

6130 PURPOSE

This subchapter establishes policy for all DEA employees on assignments in foreign countries.

6131 BACKGROUND

A. On June 30, 1976, Public Law 94-329 was enacted. The bill, "International Security Assistance and Arms Export Act of 1976," provides in section 504 as follows:

"(c)(1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts."

B. The Conference Committee Report for the statute reads, in relevant part, as follows:

Section 504 (b) *Police Actions Involving U.S. Personnel*

"This subsection amends section 481 of the Foreign Assistance Act by adding a new subsection which prohibits U.S. personnel from engaging or participating in direct police arrest actions in any foreign country in connection with narcotics control efforts. In adopting this provision the committee seeks to insure that U.S. narcotics control efforts abroad are conducted in such a manner as to avoid involvement by U.S. personnel in foreign police operations where violence or the use of force could reasonably be anticipated. By "arrest actions" the committee means any police action which, under normal circumstances, would involve the arrest of individuals whether or not arrests, in fact, are actually made. The committee intends that the U.S. Ambassador in

release

any country where U.S. narcotics control activities are being carried out shall exercise close supervision over such activities to insure that U.S. personnel do not become involved in sensitive internal law enforcement operations which could adversely effect U.S. relations with that country.

"The committee emphasizes that this provision is not intended to prohibit U.S. Government agencies from assisting foreign governments to enforce their own laws on narcotics trafficking by providing such assistance as training, technical equipment, and intelligence."

C. During Senate debate on February 5, 1976, Senators Percy and Mansfield engaged in a dialogue attempting to explain the meaning of the provision that later was enacted as P.L. 94-329. Senator Percy said the following, to which there was no objection:

"This amendment does not preclude American narcotic agents from engaging in other activities which are permissible under the law of the host nation and which would be of great help in the enforcement of Federal drug laws here in the United States. These include principally: undercover operations or other information gathering methods, not involving the use of force, for acquiring tactical and strategic intelligence; -- the handling and development of informants; evaluating intelligence, information gathering, and drug law enforcement operations of foreign police officials to undertake special surveillance assignments, or contracting with private parties and informants to undertake such activities."

6532 DEA MISSION IN FOREIGN COUNTRIES

DEA was designated by Reorganization Plan No. 2 of 1973 as the Federal agency to deal with foreign drug law enforcement officials. In doing so it acts under the policy guidance of the Office for Drug Abuse Policy, the Secretary of State, and the U.S. Ambassador assigned to each country. Since many of the

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serious drugs of abuse in the United States originate in foreign countries, DEA places a high priority on encouraging the greatest commitment from other governments to concentrate on all aspects of illicit production and distribution of drugs. The primary mission of DEA in foreign countries is to assist host government officials in preventing supplies of illicit drugs from entering the illicit traffic affecting the United States. In carrying out its overseas mission, DEA activities should give priority to those major drug trafficking organizations which impact upon the availability of illicit controlled substances in the United States.

6533 DEFINITIONS

[redacted]

B. *Ambassador.* Chief of the United States Mission in a foreign country having jurisdiction over the activities of DEA representatives.

C. *Arrest Actions.* Any police action that under normal circumstances would involve the arrest of individuals, whether or not arrests actually are made.

D. *Article 35 of the 1961 Single Convention (Action Against the Illicit Traffic)*

"Having due regard to their constitutional, legal and administrative systems, the parties to the Convention shall:

"a. Make arrangements at the national level for coordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such coordination;

"b. Assist each other in the campaign against the illicit traffic in narcotic drugs;

"c. Cooperate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic.

"d. Ensure that international cooperation between the appropriate agencies be conducted in an expeditious manner, and;

"e. Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the parties. This requirement shall be without prejudice to the right of the party to require that legal papers be sent to it through the diplomatic channel."

E. *Authorized Host Country Officials.* Officials who are empowered by their government to authorize the participation of DEA representatives in matters involving drug control.

[redacted]

G. *ODAP.* Office of Drug Abuse Policy.

H. *Cruel or Inhuman Treatment.* Conduct which endangers the life, limb or health of an individual or creates reasonable apprehension of such danger.

[redacted]

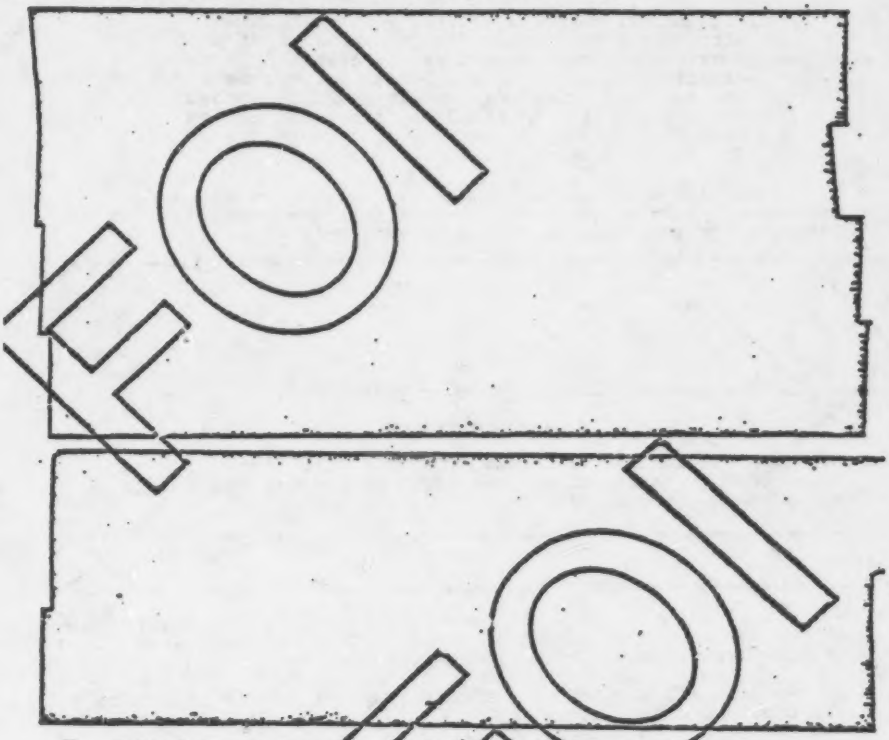
J. *DEA Representatives.* Any employee of DEA who is appointed in the civil service of the executive branch of the United States Government.

K. *Drugs.* All controlled substances listed in the schedules of the Controlled Substances Act.

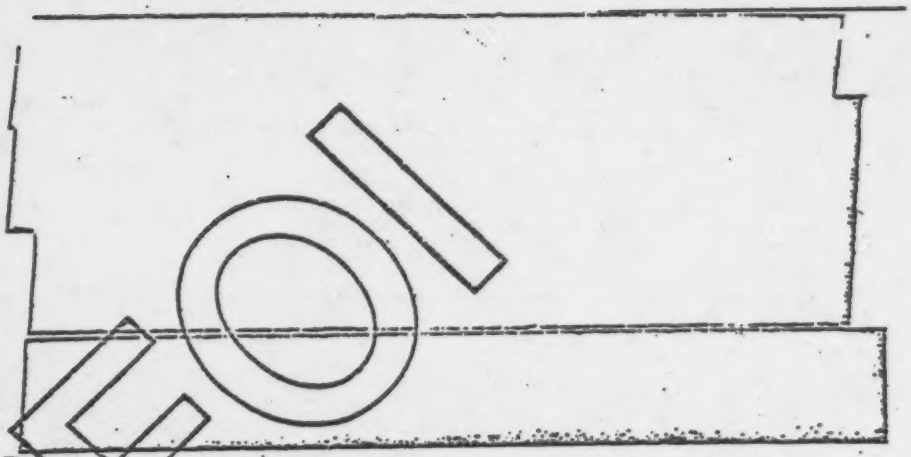
L. *Embassy Narcotics Coordinator.* An official, designated by the Ambassador, responsible for the coordination of U.S. mission elements with respect to drug control programs.

M. *Foreign Country.* Foreign territories, continental or insular, outside the jurisdiction of the United States.

N. *Illicit Drugs.* All controlled substances in the schedules of the Controlled Substances Act that are manufactured, possessed, or distributed contrary to law.



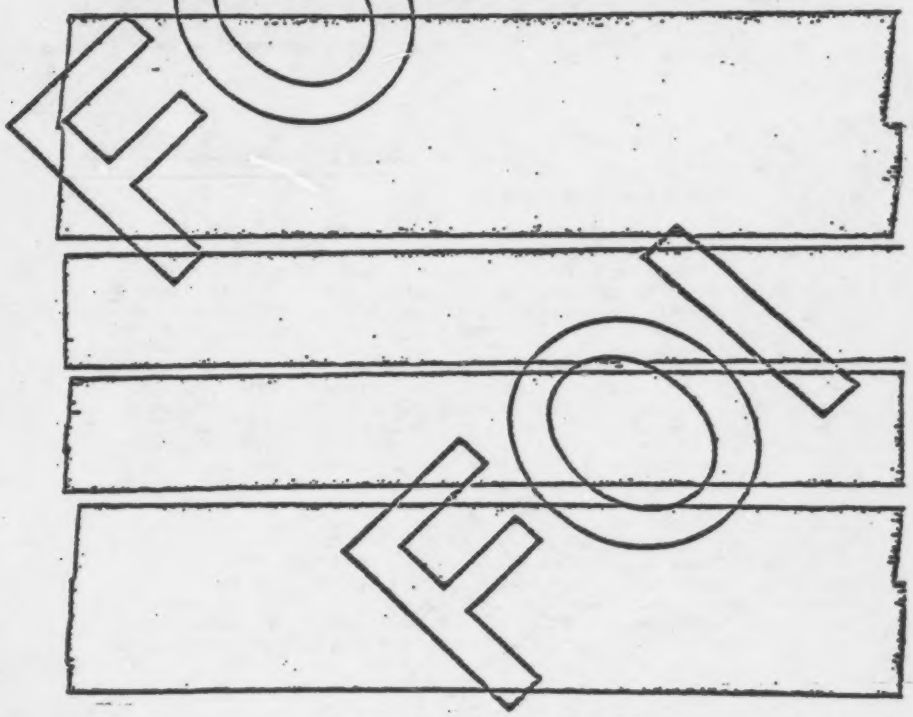
U. *United States Person.* A citizen of the United States or permanent resident alien.



H. *U.S. Drug Control Programs*

1. *Background.* The President has established the Office of Drug Abuse Policy (ODAP) and revitalized the Strategy Council on Drug Abuse. He has directed that the Strategy Council, created by the Drug Abuse Office and Treatment Act of 1972, serve as the government-wide advisory committee for the drug abuse problem area. The members of the Council are the Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of Labor, Secretary of Health, Education and Welfare, Secretary of Transportation, the U.S. Representative to the United Nations, the Director of the Office of Management and Budget, Director of Central Intelligence, and the Administrator of Veterans Affairs. The Director of the Office of Drug Abuse Policy serves as the Executive Director of the Council. With regard specifically to the overseas aspects, the Secretary of State retains total policy and program responsibility for the United States international narcotics control effort, including coordination of the activities of DEA and other participating agencies. These activities will comply with the policy guidelines developed to assure that the United States international narcotics effort is given high priority and that there is proper coordination of all diplomatic, intelligence, and law enforcement liaison activities of international scope.

As part of the Department of State's policy and program responsibility, it allocates and manages the international narcotics control assistance funds appropriated in the Foreign Assistance Act. This is done by delegation of authority from the Secretary of State to his Senior Advisor and Coordinator for International Narcotics Matters. Under this program, Narcotics Control Action Programs are developed for principle countries involved in the production and trafficking of illicit drugs. In various aspects of country program implementation, the Department of State relies upon DEA, as well as other agencies having specialized expertise to contribute, such as the U.S. Customs Service, the Agency for International Development, the National Institute for Drug Abuse, and the Department of Agriculture.



6654 CIVIL SEIZURES AND FORFEITURES

There are three basic types of forfeiture proceedings against vehicles and property which have been seized under the civil seizure and forfeiture provisions of the Controlled Substances Act. The first such procedure is a summary forfeiture of schedule I substances and the source plants of schedule I and II substances. Then schedule I substances and source plants of schedule I and II substances are possessed, transferred, sold or offered for sale in violation of the act they are deemed contraband and are summarily forfeited after seizure. A summary forfeiture under the CSA means that no formal forfeiture procedures of any type are required. The term summarily forfeited under the CSA is not to be confused with an administrative forfeiture proceeding under the customs laws.

The second type of forfeiture proceeding is an administrative forfeiture. Administrative forfeiture proceedings will be used against substances, vehicles or other property which is valued at $2,500.00 or less.

The third type of forfeiture proceeding is a judicial forfeiture. Judicial forfeiture proceedings will be used against substances, vehicles or other property which has a value greater than $2,500.00.

Forfeiture of substances and property in revocation of registration proceedings mentioned in section 304(f) of the CSA are not a separate type of forfeiture, but rather they are administrative or judicial, as indicated above.

Although the authority of DEA to make a civil seizure of controlled substances, vehicles, equipment, products, records, etc., is contained in one basic law, each type of seizure requires independent policy, procedures and administrative action on the part of DEA. For this reason, each basic type of seizure will be discussed independently. In subsection 6654.1 the procedures for the civil seizure of controlled substances, precursors, equipment, and materials are set out. The procedures for the civil seizure of vehicles are set out in subsection 6654.2.

The opposite of a civil seizure is, of course, the seizure of a substance or article as evidence. The evidence handling procedures are set out in Subchapter, 666, Evidence.

6654.1 THE CIVIL SEIZURE OF CONTROLLED SUBSTANCES, PRECURSORS, EQUIPMENT, MATERIALS, RECORDS, AND PRODUCTS

6654.11 Authority. The Controlled Substances Act of October 27, 1970, section 511, provides that:

A. The following are subject to forfeiture to the United States and no property rights exist in them:

1. All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the act.

2. All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance in violation of the act.

3. All property which is used, or intended for use, as a container for property described in 1 or 2.

4. All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of the act.

B. Any property subject to forfeiture to the United States under the act may be seized by the Attorney General upon process issued by any district court of the United States having jurisdiction over the property pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, except that seizure without such process may be made when

1. The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant,

2. The property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title,

3. The Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety, or

4. The Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this title.

In the event of seizure pursuant to 3 or 4 above, forfeiture proceedings must be instituted promptly.

C. Property seized under the act is not repleviable, but is deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this act, the Attorney General may

1. Place the property under seal (see 6654.4),

2. Remove the property to a place designated by him, or

3. Require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law.

D. Whenever property is forfeited under the act, the Attorney General may

1. Retain the property for official use.

2. Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public. (The proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs.)

3. Require that the General Services Administration take custody of the property and remove it for disposition in accordance with law.

4. Forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

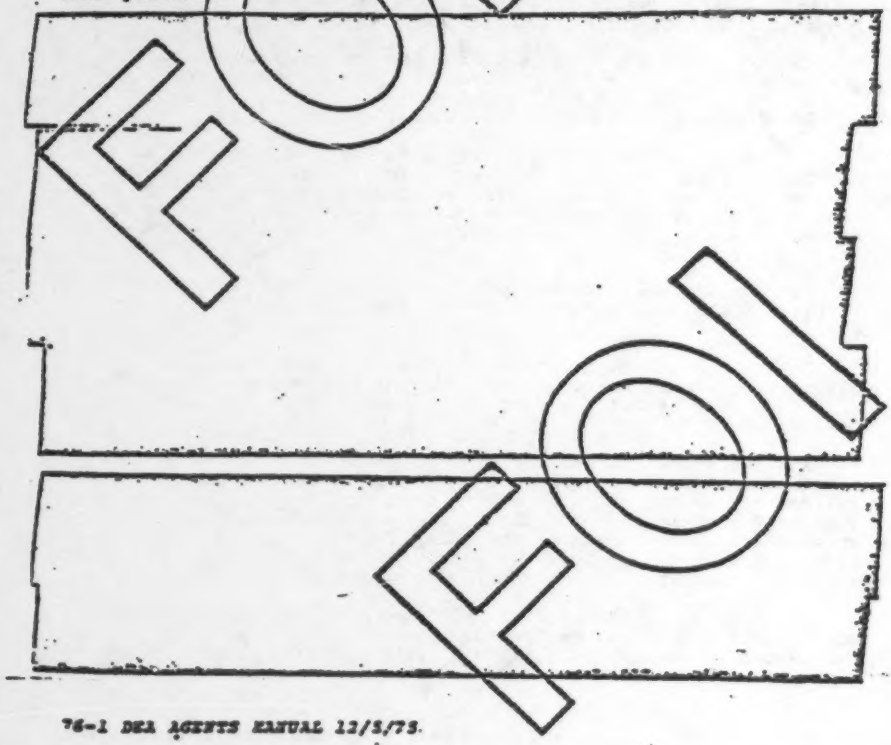
E. All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of the act shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

F. All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of the act, or of which the owners or

cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.



6654.16 *Forfeiture Proceedings.* There are two types of forfeiture proceedings--administrative if the property is valued at less than $2500, or judicial if the property is valued at more than $2500 or a claim and cost bond is filed on property valued at less than $2500.

A. *Administrative Forfeiture.* In an administrative forfeiture situation, the owner or a party with a financial interest may choose any of three courses of action. He may contest the probable cause for the seizure in Federal court by filing a claim and cost bond, he may seek administrative relief to recover his interest in the property by submitting a petition for remission or mitigation of forfeiture, or he may do nothing.

1. If he chooses to contest the seizure, he must file a claim and cost bond ($250 in check or securities) with the Regional Director within 20 days from the first date of publication. Once this time has elapsed, he cannot file a claim and cost bond and thus cannot contest the seizure. The property is then summarily forfeited to the Government.

If a claim and cost bond is filed during this period, the procedure automatically becomes judicial.

2. If he chooses to seek administrative relief to recover his interest in the property, he must file a petition for remission or mitigation of forfeiture with the Regional Director.

3. If he chooses to do nothing, the property is summarily forfeited to the Government 20 days from the first date of publication. At the end of this 20-day period, if no claim and cost bond has been filed, then submit a DEA-294, Declaration of Forfeiture, to the Office of Chief Counsel. The Region will be notified to sell or otherwise dispose of the property by Headquarters.

B. *Judicial Forfeiture.* If the value of the property is $2500 or more, or if a claim and cost bond has been filed with the Regional Director in an administrative proceeding, then judicial forfeiture proceedings will be implemented. The Regional Director will send a joint letter with a double heading to the owner and lienholder. The letter will set forth that the stated property was seized on a stated date, and that if they wish to submit a petition for remission or mitigation of forfeiture to the Regional Director, they should do so in triplicate and within 30 days from the date of seizure.

The Region will also refer the seizure by letter to the U.S. attorney with the following attachments: a copy of the DEA-23b and DEA-23c, if prepared, the DEA-6 reporting the seizure, a copy of the letter to the owner and lienholder, and a copy of the newspaper advertisement (if any). The letter will request that he file a complaint for forfeiture against the property, and the court will issue a monition. The owner or interested party may then choose any of three courses of action--he may contest the seizure, he may seek relief to recover his interest in the property, or he may do nothing.

1. He may choose to contest the basis for seizure when the matter reaches the Federal court. The district court will determine whether or not the property was used in violation of the law and whether all legal proceedings were satisfied.

2. If he chooses to seek administrative relief to recover his interest in the property, he must file a petition for remission or mitigation of forfeiture with either the Regional Director or the U.S. attorney.

3. If he chooses to do nothing, then the property will be summarily forfeited to the Government by judicial decree.

The monition has a return date on it. If no action is taken by the owner or interested party by that return date, the U.S. attorney will file a Decree of Condemnation, which, once final, directs the U.S. Marshal to dispose of the property. The U.S. Marshal's Office will arrange for appropriate disposition of the property, generally either by sale or by release to the DEA Regional Director or other recipient.

The Office of Chief Counsel will request GSA headquarters to designate property subject to judicial forfeiture for official use by DEA or another Federal agency. GSA headquarters will then request their Regional Counsel to file appropriate documents with the U.S. attorney to designate the recipient.

6654.17 Petition Investigation

A. *Provisions for Petitioning.* Following seizure of property, any person with a financial interest in such property may file a petition for remission or mitigation of forfeiture. (See subsection 6654.2 for conveyances.) This petition will be decided upon by the Administrator or his designee in the case of administrative forfeiture and by the representative of the Attorney General in the case of judicial forfeiture. The petition must be filed in triplicate with the Regional Director for the judicial district in which the seizure occurred. It must be addressed to the Administrator of the Drug Enforcement Administration or the Attorney General and executed and sworn to by the person alleging interest in the property.

The petition must include the following:

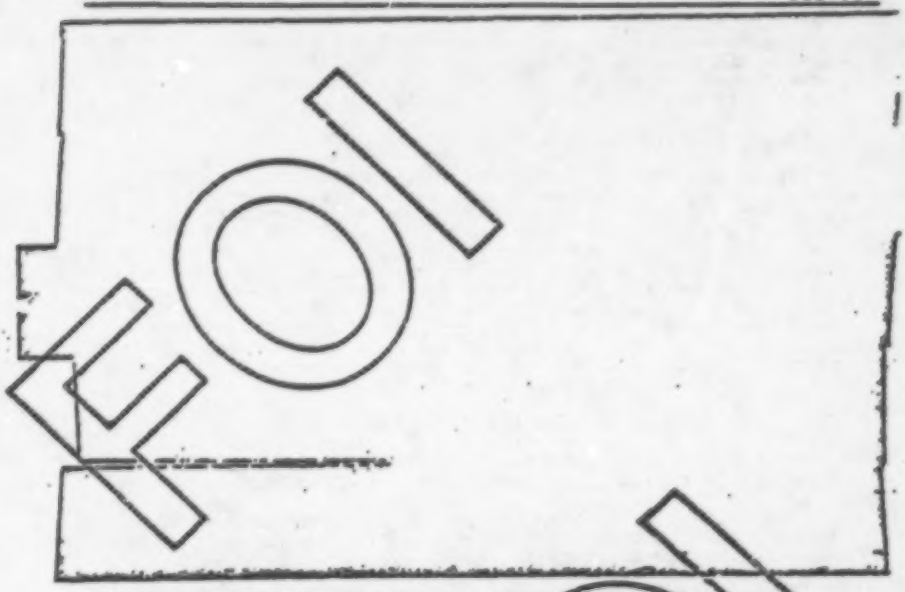
1. A complete description of the property including serial numbers, if any, and the date and place of seizure,

2. The petitioner's interest in the property, which shall be supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence, and

3. The facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify remission or mitigation.

The petition should be submitted within 30 days of the receipt of the notice of seizure, and must be submitted before the property is sold or placed in official use.

Persons making inquiry as to petition procedures should be furnished with a copy of 21 CFR 316.79-316.81 (copies have been furnished to all Regions). If the forfeiture proceedings are administrative, forward a copy of the petition to the Compliance Investigations Division. If they are judicial, forward a copy of the petition to the U.S. attorney with a cover letter advising that the petition will be investigated, and forward a copy to the Office of Chief Counsel. If the petition was submitted to the U.S. attorney and he has forwarded it to the Region for investigation, send a copy of it to the Compliance Investigations Division.



F. *Petitions for Reconsideration.* The Justice Department regulations provide a 10-day period from the date of the denial of a petition for property subject to administrative forfeiture, and a 20-day period from the date of denial of a petition for property subject to judicial forfeiture wherein a petitioner can seek reconsideration "based on evidence recently developed or not previously considered." The 28 CFR 9.4(e). Should a request for reconsideration be received in DEA Headquarters, or in the Department, the concerned Region will be advised if any subsequent investigation is required as a result of matters raised in the request for reconsideration.

G. *Petitions for Restoration of the Proceeds of Sale.* A petition for restoration of proceeds of sale, or for the value of property otherwise disposed of, must be filed within 90 days of the sale of the property, or other disposition.

This type of petition must be supported by satisfactory proof that the petitioner did not know of the seizure prior to the

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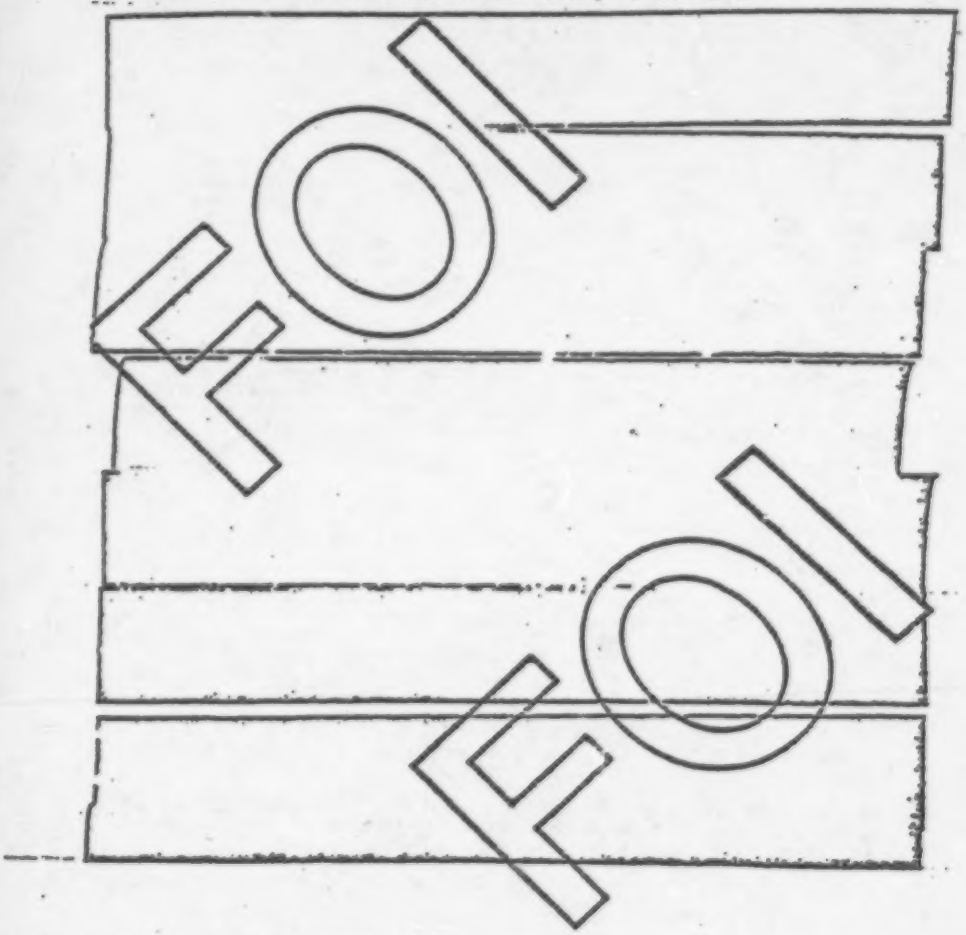
declaration of condemnation or forfeiture and was in such circumstances as prevented him from knowing of the same.



6634.2 CIVIL SEIZURE OF VEHICLES

6634.21 Authority. The Controlled Substances Act of October 27, 1970, Section 511, provides that

A. All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of all controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the act and all raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of the act shall be subject to forfeiture to the United States, and no property right shall exist in them except that

1. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of the act unless it appears that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of title II or title III, and

2. No conveyance shall be forfeited under the provisions of the act by reason of any act or omission established by the owner to have been committed or omitted by any person other than the owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state.

B. Any property subject to forfeiture to the United States under the act may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when

1. The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant,

2. The property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title,

3. The Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety, or

4. The Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of the act.

C. Property seized under the act is not repleviable, but is deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction. Whenever property is seized under the provisions of this title, the Attorney General may

1. Place the property under seal,

2. Remove the property to a place designated by him, or

3. Require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law.

D. Whenever property is forfeited under this act the Attorney General may

1. Retain the property for official use,

2. Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs,

3. Require that the General Services Administration take custody of the property and remove it for disposition in accordance with law, or

4. Forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

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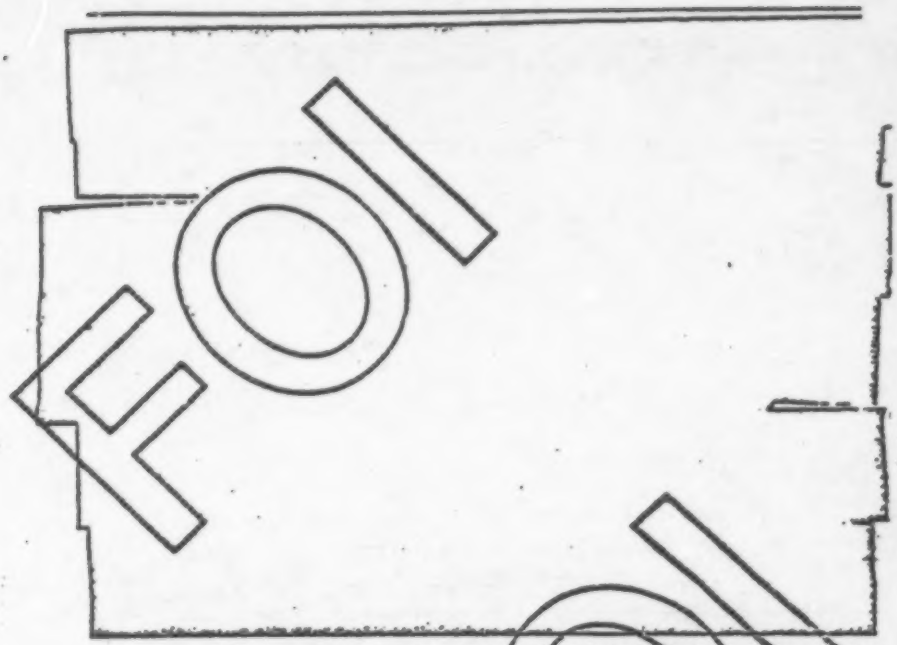
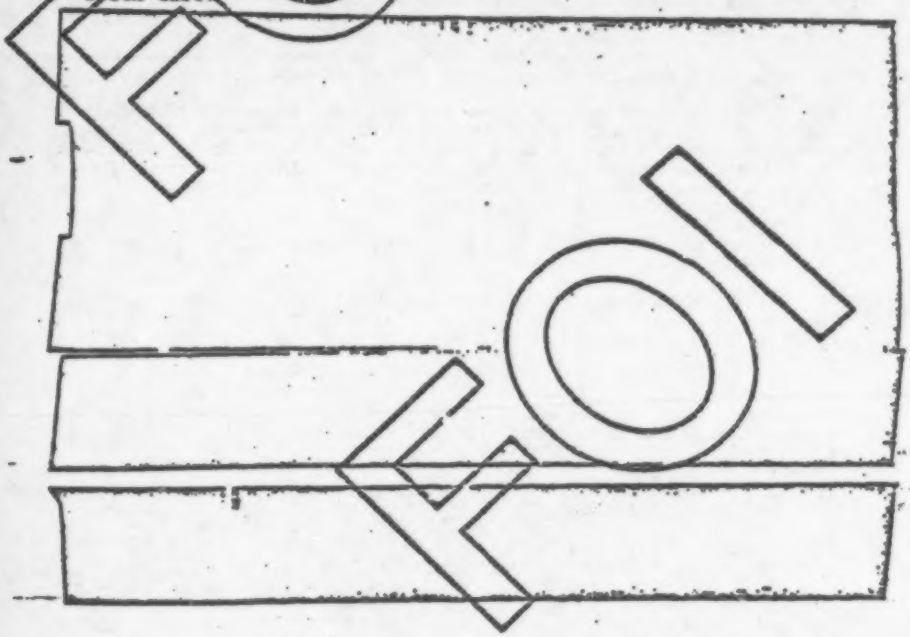


I. *Facilitation.* Section 511(a)(4) of the Controlled Substances Act (21 U.S.C. 881(a)(4)) provides that conveyances are subject to forfeiture "...which are used, or intended for use, to transport, or in any manner *facilitate* the transportation, sale, receipt, possession, or concealment of property..." The most difficult word in the above quotation is "facilitate", particularly when this word is applied to negotiations and money involved in illicit transactions. Federal case authority has defined "facilitate" to mean "to make easy or less difficult" a particular activity. *United States v. One 1950 Buick,* 231 F.2d 219 (3rd Cir., 1956). It is also well settled that the "probable cause" necessary in forfeiture proceedings is less than prima facie legal proof and no more than reasonable ground for belief in guilt. *United States v. One 1963 Cadillac Hardtop,* 231 F.Supp. 27 (D.C. Wis. 1964).

J. Every effort should be made to assist United States attorneys offices in the area of vehicle seizures, since the offices in many small cities are not familiar with vehicle seizure processing. Particularly, many U.S. attorneys are inclined to delay unnecessarily proceeding of a civil vehicle forfeiture because of the pending criminal action involving the owner of the vehicle. One of the reasons for the reluctance of Federal prosecutors in this area is that they anticipate the civil discovery procedures will reveal the facts of the criminal prosecution prematurely. However, the case of *United States* v. *One 1967 Buick*, 304 F.Supp. 1102 (M.D. Pa., 1969), holds that the Government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter.

Hence, even if appropriate discovery motions were filed in the civil forfeiture case, the U.S. attorney may avoid the premature disclosure of his criminal case by relying on the *1967 Buick* case.



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6654.3 FORFEITURE AND PETITION PROCEEDINGS

6654.31 *Forfeiture Proceedings.* There are two types of forfeiture proceedings, administrative, if the vehicle is valued at less than $2500, or judicial, if the vehicle is valued at more than $2500 or a claim and cost bond is filed on a vehicle valued at less than $2500.

A. *Administrative Forfeiture.* In an administrative forfeiture situation, the owner or a party with a financial interest may choose any of three courses of action. He may contest the probable cause for the seizure in Federal court by filing a claim and cost bond, he may seek administrative relief to recover his interest in the vehicle by submitting a petition for remission or mitigation of forfeiture, or he may do nothing.

1. If he chooses to contest the seizure, he must file a claim and cost bond ($250 in check or securities) with the Regional Director within 20 days from the first date of publication. Once this time has elapsed, he cannot file a claim and cost bond and thus cannot contest the seizure. The vehicle is then summarily forfeited to the Government.

If a claim and cost bond is filed during this period, the procedure automatically becomes judicial.

2. If he chooses to seek administrative relief to recover his interest in the vehicle, he must file a petition for remission or mitigation of forfeiture with the Regional Director.

3. If he chooses to do nothing, then the vehicle is summarily forfeited to the Government 20 days from the first date of publication. At the end of this 20-day period, if no claim and cost bond has been filed, then submit a DEA-294, Declaration of Forfeiture, to the Office of Chief Counsel. At the time the DEA-294 is executed, the Region should either refer the vehicle to GSA for sale, or send a request to Chief Counsel to place the vehicle in official use.

B. *Judicial Forfeiture.* If the value of the vehicle is $2500 or more, or if a claim and cost bond has been filed with the Regional Director in an administrative proceeding, then judicial forfeiture proceedings will be implemented. The Regional Director will send a joint letter with a double heading to the registered owner and the lienholder. The letter should set forth that the stated vehicle was seized on a stated date, and that

if they wish to submit a petition for remission or mitigation of forfeiture to the Regional Director, they should do so in triplicate and within 30 days from the date of seizure.

The Region will also refer the seizure by letter to the U.S. attorney with the following attachments: a copy of the DEA-23 and DEA-6, documenting probable cause (if necessary); a copy of the letter to the owner and lienholder; and a copy of the newspaper advertisement (if any). The letter will request that he file a complaint for forfeiture against the vehicle, and the court will issue a monition. The owner or interested party may then choose any of three courses of action. He may contest the seizure, he may seek relief to recover his interest in the vehicle, or he may do nothing.

1. He may choose to contest the basis for seizure when the matter reaches Federal court. The district court will determine whether or not the vehicle was used in violation of the law and that all legal proceedings were satisfied.

2. If he chooses to seek administrative relief to recover his interest in the vehicle, he must file a petition for remission or mitigation of forfeiture with either the Regional Director or the U.S. attorney.

3. If he chooses to do nothing, then the vehicle will be summarily forfeited to the Government. The monition has a return date on it; if no action is taken by the owner or interested party by that return date, the U.S. attorney will file a Default Decree of Condemnation which, once final, directs the U.S. Marshal to dispose of the property. The U.S. Marshal's Office will arrange for appropriate disposition of the property, generally either by sale or release to the DEA Regional Director.

The Office of Chief Counsel will request GSA Headquarters to designate vehicles subject to judicial forfeiture for use by DEA. GSA Headquarters will then request their Regional Counsel to file appropriate documents with the U.S. attorney to designate DEA as the recipient of the vehicle.

6654.32 Petition Investigations

A. *Provision for Petitioning.* Following seizure of a vehicle, vessel, or aircraft, any person with a financial interest in such property may file a petition for remission or mitigation of forfeiture. This petition will be decided upon by the Administrator or his designee in the case of administrative forfeiture and by the representative for the Attorney General in the case of judicial forfeiture. The petition must be filed in triplicate with the Regional Director for the judicial district in which the

seizure occured. It must be addressed to the Administrator of the Drug Enforcement Administration and executed and sworn by the person alleging interest in the property.

The petition must include the following:

1. A complete description of the property, including motor and serial numbers, if any, and the date and place of seizure,

2. The petitioner's interest in the property, which shall be supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence, and

3. The facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify remission or mitigation.

The petition should be submitted within 30 days of the receipt of the notice of seizure and must be submitted before the vehicle is sold or placed in official use.

Persons making inquiry as to petition procedures should be furnished with a copy of 21 CFR 316.79-316.81 (copies have been furnished to all Regions). If the forfeiture proceedings are administrative, forward a copy of the petition to the Office of Chief Counsel. If they are judicial, forward a copy of the petition to the U.S. attorney with a cover letter advising that the petition will be investigated, and forward a copy to the Office of Chief Counsel.

If the petition was submitted to the U.S. attorney and he has forwarded it to the Region for investigation, send a copy of it to the Office of Chief Counsel.

FOIA

F. *Petitions for Reconsideration.* The Justice Department regulations provide a ten-day period from the date of the denial of a petition for a vehicle subject to administrative forfeiture, and a 20-day period from the date of denial of a petition for a vehicle subject to judicial forfeiture, wherein a petitioner can seek reconsideration "shall be based on evidence recently developed or not previously considered." See 28 CFR 9.4(e). Should a request for reconsideration be received in Headquarters or in the Department, the concerned Region will be advised if any subsequent investigation is required as a result of matters raised in the request for reconsideration.

G. *Petitions for Restoration of the Proceeds of Sale.* A petition for restoration of proceeds of sale, or for the value of property placed in official use, must be filed within 90 days of the sale of the property, or within 90 days of the date the property is placed in official use.

This type of petition must be supported by satisfactory proof that the petitioner did not know of the seizure prior to the declaration of condemnation or forfeiture and there were circumstances that prevented him from knowing of the same.

FOI

6634.5 DISPOSITION OF PROPERTY SEIZED AND PROCESSED UNDER THE CIVIL SEIZURE AND FORFEITURE PROVISIONS OF THE CSA

6634.51 Authority. Whenever property is forfeited under the CSA, the Attorney General may

A. Retain the property for official use,

B. Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs,

C. Require that the General Services Administration take custody of the property and remove it for disposition in accordance with law, or

D. Forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

6634.52 Procedures. When forfeiture procedures are judicial, DEA requests the U.S. attorney to file a complaint for forfeiture with the court. Once filed, the court issues a monition which directs the United States Marshal to "arrest" the property. In this regard, the monition is the same as an arrest warrant for a person. The U.S. Marshal, if practical, must take possession of the property and affix a copy of the complaint for forfeiture and monition to the property and leave a copy of the complaint and monition with the person having possession or his agent.

When the property is stored in a DEA facility the Marshal can "arrest" it and attach the documents and need not remove it from the DEA storage area.

When the property was "seized in place" at the location of seizure, because it was impractical to move, the Marshal will

6654.52

attach the documents to the property under DEA seal and will leave copies with the person from whom the property was seized.

Property which is not perishable will be kept under seal and storage until a DEA-29, Declaration of Forfeiture, is executed by the Regional Director and the Office of Chief Counsel directs the manner of disposition in an administrative forfeiture.

In a judicial forfeiture, the property will remain under seal until a Decree of Condemnation is executed by the court ordering the U.S. Marshal to dispose of the property. The Regional Office will then submit a copy of the final decree to the Office of Chief Counsel. The Office of Chief Counsel will direct the method of disposition based on the provisions of the CSA and the Regions will, in turn, make the necessary arrangements with the U.S. Marshal, GSA or other appropriate agency for disposition.

6654.53 Disposition of Seized Property Prior to Conclusion of Forfeiture Proceedings. Under certain conditions it may be advantageous to both parties in a civil action to dispose of the seized property itself before the forfeiture proceedings are concluded when, for example, a controlled substance will lose its potency in storage over a long period of time and thereby be of no value. Such agreements may be entered into between the U.S. attorney and the claimant. Such an agreement might consist of selling the property with the proceeds of sale being held by the court until the matter is decided. The Regions will confer with the Office of Chief Counsel and the U.S. attorney for a determination as to the correct course of action when circumstances warrant this type of procedure.

FOI

COMMENTS FROM DEA AGENTS

- "The demands of the FOI Act on law enforcement agencies should be greatly decreased. The interference with complex investigations should be severely limited; and law enforcement rules, regulations, guidelines, and techniques should only be disclosed on a 'need to know' basis (evaluated internally)."

- "The Freedom of Information Act has not significantly affected undercover operations. However, it has affected the ability of investigators to obtain information from hotels, banks, rental agencies, etc., in conspiracy and financial investigations; information of a nature that formerly was readily available."

- "In . . . , state police are very reluctant to share intelligence because of FOIA."

- "The Freedom of Information Act serves no valid purpose other than aiding the violator and restricting the law enforcement agencies through having to divulge confidential information which places witnesses/informants in great danger and restricting cooperation."

- "If sources of information are properly advised of the FOIA before information is rendered to DEA, an obvious reluctance occurs on the part of the source."

- "In the year this office has been functioning we have opened over 40 cases, 90% being with state and local authorities. To date the . . . resident office has not seen any adverse effect from the FOIA."

- "The FOIA has created additional difficulty for the DEA in its endeavors to obtain records e.g., telephone toll calls because the private sector now makes it mandatory to be serviced by subpoena prior to release of said records."

- "I have had to promise not to write up certain information supplied to me by local and state law enforcement agencies due to the Freedom of Information Act."

- "Since FOIA was enacted, it is extremely noticeable that vast numbers of law enforcement agencies, especially foreign police departments, are apprehensive when it comes to relaying information relating to U.S. citizens which was obtained from cooperating individuals. Most witnesses/informants are unwilling to go on record, since they feel that as a result of FOIA, all information will be readily available to the subjects. Additionally, FOIA levies the administrative burden of completing DEA-381's everytime DEA shares information with another nonDepartment of Justice law enforcement agency."

- "It appears that everyone is afraid that information given to a DEA Agent will get back to the suspect, if not through judicial proceedings, then through the FOIA Act. Also, defendants and other suspects are the only persons who benefit from the Act, usually at the expense of the investigation, but more importantly, at the expense of public- minded citizens who cooperate with DEA because they feel it is their civic responsibility."

- "FOIA has caused prospective informants and witnesses to doubt the sincerity of DEA's pledge to protect their identity."

- "I have been a case agent in 34 investigations since September, 1976. FOI has hindered my and DEA's ability to properly investigate many of these cases."

- "Due to the fact that many of the prominent defense attorneys specializing in narcotics cases have obtained information from the FOIA, I believe it becomes common knowledge from attorney to violator and then from violator to other violator re: DEA operations. FOIA has greatly lessened our ability to obtain information from telephone companies, utility companies, etc."

- "FOIA has reduced an Agent's ability to get as much information as before from the local law enforcement and private sector, particularly banks, telephone companies and in a few cases, motels. It has greatly hindered Agents because of the resultant paperwork necessary when passing information to other agencies."

- "The public sector is becoming increasingly aware that its cooperation with law enforcement is being compromised by FOIA. Most people would like to rid their community of crime and drugs but they think twice about it if they feel the criminal has access to any information they may provide or furthermore access to their identity."

- "Because of FOIA, I am no longer able to promise an individual or an agency that I can protect their identity or sources."

- "Overall the FOIA has been a definite detriment to law enforcement as methods of detection and overall investigations have become common knowledge to the narcotics traffickers. Additionally, informants will negotiate with local and state narcotics divisions, in lieu of DEA because of the knowledge they possess of the FOIA and the constant fear of exposure prior to and after completion of judicial actions."

- "The Freedom of Information Act has had no adverse effect on this overt investigation of a pharmacist. However, the FOIA has had a serious detrimental effect on other past and current investigations. Informants, both paid and unpaid, private firms and service agencies are justifiably worried about being exposed to retribution. State and local police agencies are reluctant to identify informants who have been promised secrecy with the knowledge that the FOIA can be used to

identify them. The FOIA, allied with the Privacy Act, have done more to cripple law enforcement than any other actions taken by Congress in history. Added to this, the fact that no appreciable benefit to the private citizen has ensued from these Acts and the result can fairly be assessed as disasterous."

- "Defendants, witnesses and the public business sector are aware of the access that people have to government files through the Freedom of Information Act. State and local law enforcement officials do not want their reports subject to being given to defendants through the Freedom of Information Act. Law enforcement is better off without the Freedom of Information Act."

- "The Freedom of Information Act has made it increasingly difficult for law enforcement agencies to obtain information from the private sector. This has the effect of inhibiting many investigations, due to the fact that if inquiries are made during the course of the investigation, these inquiries may be made known to the person or persons who are under investigation. Many sources of information in the private sector are not being utilized by investigators for fear that the investigation may be compromised. The Freedom of Information Act and the side effects of the Freedom of Information Act has also inhibited the free flow of information between government agencies."

- "Secrecy is often essential in a narcotics investigation. The secrecy is important for the successful pursuit of the investigation, and often important for the safety of informants and others who provide necessary information about the subjects under investigation. Further, numerous police departments are hestitant to reveal sources of information and methods of operation for fear of their revelation via a Freedom of Information request."

- "Manufacturers and distributors of legally manufactured drugs have on occasion expressed reluctance to provide information on the volume or method of business conducted for fear that competitors could obtain that information through a Freedom of Information request."

- "The knowledge of DEA investigative techniques utilized in cyclic investigations of registrants has allowed the drug industry to know beforehand what the C/I's are looking for. In certain instances . . . this awareness has allowed for a markedly increased diversion potential."

- "I have found that defendants involved in the higher level of trafficking are more aware of the FOIA and utilize this to their advantage. This can and has been devasting to DEA's investigations depending on the case, and the type of information the defendant attained."

- "Motels, hotels, and car rental agencies are requiring subpoenas for records, etc. U.S. Postal Service is requiring letters to obtain P.O. box subscribers, all of which are causing not only additional paperwork but delays in the investigations where this information is vitally necessary to proceed forward."

- "This office has had some difficulty in obtaining information and reports from state and local police agencies and the private sector because of their fear of its being subject to disclosure through the FOIA. Further, investigations have been compromised through the disclosure of radio frequencies and investigative techniques have been made known to the public through FOIA."

- "FOI's influence is most strongly felt when a violator files a request during an active investigation. An experienced violator need only be told there is an active investigation and nothing can be given out to know he is being investigated. Convicted and sentenced violators who file requests learn the techniques used to develop a case against them and, consequently, when they are released they avoid making the same mistakes."

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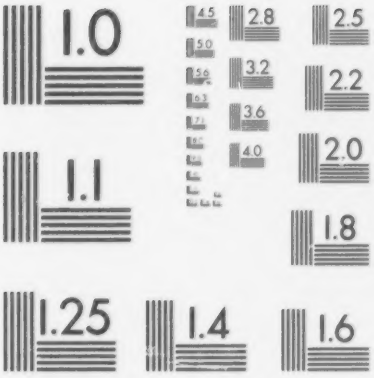

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